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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

J. GERARD HOGAN, *et al.*,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

Petition for a Writ of Certiorari to the Wisconsin Court of Appeals, District IV

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state remedy, which is not plain, speedy and efficient and which leads to an unjust result can be an adequate, meaningful, clear and certain remedy sufficient to meet the requirements of due process.

PARTIES TO THE PROCEEDINGS

Petitioners are J. Gerard Hogan, Delores M. Hogan, the 362 individually named petitioners * and fifteen thousand elderly members of the petitioner class of retired federal employees, their heirs, estates and personal representatives certified by the Wisconsin Tax Appeals Commission. The respondent is the Wisconsin Department of Revenue.

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* A list of the individual petitioners is set forth in Appendix P, at 134a-137a.

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PETITION FOR A WRIT OF CERTIORARI

J. Gerard Hogan, Delores M. Hogan, the 362 individually-named petitioners, and the fifteen thousand members of the class certified below respectfully petition this Court for a writ of certiorari to the Wisconsin Court of Appeals, District IV.

OPINIONS BELOW

The order of the Supreme Court of Wisconsin denying review is unreported. (App. A at 1a). The opinion of the Wisconsin Court of Appeals (App. B at 2a) is reported at 198 Wis. 2d 792, 543 N.W.2d 825 (Ct. App.

1995). The decisions of the trial court (App. D at 25a; App. E at 28a) are unpublished. The decision of the Wisconsin Tax Appeals Commission ("Commission") certifying the class and denying the respondent's prospectivity defense (App. M at 111a) is reported at CCH Wisconsin Tax Reporter (1990 to 1993 Transfer Binder) ¶ 203-377. The Commission's decision denying the respondent's Rehearing Petition (App. L at 75a) is reported at CCH Wisconsin Tax Reporter (1990 to 1993 Transfer Binder) ¶ 203-397. The Commission's class certification order (App. K at 71a) is also reported at CCH Wisconsin Tax Reporter (1990 to 1993 Transfer Binder) ¶ 203-397. The transcript of the Commission's oral decision awarding refunds (App. G at 44a) is unreported. The Commission's related orders are unreported (App. H at 53a).

JURISDICTION

The Wisconsin Court of Appeals issued its decision on December 21, 1995. (App. B, 2a). On January 19, 1996 the petitioners filed a timely petition for review with the Supreme Court of Wisconsin. That court denied the petition on March 12, 1996. (App. A, 1a). This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or

> causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2 provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

The Due Process Clause of the United States Constitution, Amendment XIV, § 1, provides in relevant part:

> . . . [n]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Article I, secs. 1, 9 and 13 of the Wisconsin Constitution provide in relevant part:

> Section 1. All people are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.
>
> * * *
>
> Section 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.
>
> * * *
>
> Section 13. The property of no person shall be taken for public use without just compensation therefor.

Pertinent provisions of Wisconsin's statutory scheme are set forth in App. Q and R, at 138a, *infra.*

STATEMENT OF THE CASE

This tax refund proceeding was commenced on April 17, 1989 by J. Gerard Hogan and Dolores M. Hogan ("Hogans") on behalf of themselves and the class of all other federal retirees similarly situated by the filing of a refund claim with the Wisconsin Department of Revenue ("WDOR"). This proceeding sought refund relief under state law, the Due Process Clause of the Fourteenth Amendment, and Article I, secs. 1, 9 and 13 of the Wisconsin Constitution for Wisconsin's discriminatory income taxation of the Hogans' and the class' federal pensions in violation of, *inter alia, Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989). (No. 1).[1] The claim was made in the Hogans' 1988 Wisconsin personal income tax return, which incorporated by reference the class complaint simultaneously filed in *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (1991), *cert. denied*, 502 U.S. 1030 (1992) (Hogan I). (No. 19). In *Hogan I*, the Supreme Court of Wisconsin determined that the *Hogan I* complaint was a "*refund claim* under a different name." *Hogan I*, 163 Wis. 2d at 22 (emphasis added). The WDOR denied the Hogans' refund claims, the

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[1] Documents contained in the Commission record are from Docket No. 91-I-386 and will be referred to by the number assigned by the Commission, *e.g.*, "No. 1." Unfortunately, one document number is often assigned to multiple items filed by the Commission or by a party. The record in each circuit court case on review is separately indexed until the WDOR's ten petitions for review were consolidated. Proceedings involving each petition subsequent to the first-filed case are contained in File A through File I. Proceedings involving the first-filed petition and events which occurred after consolidation are contained in a general index. Documents contained in the separate files will be referred to by the file letter and the document number, *e.g.*, "A. 1." Documents contained in the consolidated file will be referred to by the general letter "R." for record, followed by the number of the document, *e.g.*, "R. 1."

Hogans requested redetermination of the WDOR's refund denial, and the WDOR denied their redetermination petition. (No. 3).

For taxes attributable to years prior to 1989, the WDOR determined that under "*Davis* . . . taxation by Wisconsin of federal retirement benefits of any person who was a member . . . or retired from a federal retirement system or fund as of December 31, 1963, is discriminatory and invalid." (No. 10). Relying on its prospectivity defense, however, the WDOR refused to pay refund claims, despite having identified the claimants in the class and the amount of their claims. Because the amount of the refund claims of the members of the class was so great, the WDOR determined that it was inequitable to pay the refund claims of the members of the class. (No. 10, 18).

During the pendency of *Hogan I* and this refund proceeding, the Wisconsin legislature cured the WDOR's discriminatory scheme of taxation of the federal pensions of the class for years 1989 and after:

> On August 9, 1989, 1989 Wis. Act 31, Section 1817m, went into effect *exempting for 1989 and subsequent tax years* the pension income of the federal retirees in the *certified class.*

Hogan I, 163 Wis. 2d at 9-10 (emphasis added).

Prior to April 17, 1989, the WDOR determined that it would not comply with its statutory duty under Wis. Stat. §§ 73.03(1) (App. R at 152a) and 71.80(3) to correct its assessments and issue refunds to Wisconsin federal retirees for years 1984 through 1988. (No. 19).[2] The WDOR informed federal retirees that it would continue to enforce the discriminatory scheme and penalize

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[2] Under Wisconsin law, the WDOR is required by statute to refund or credit all overpayments of tax, irrespective of whether a taxpayer has filed a refund claim. Wis. Stat. § 71.80(3). (App. R at 143a).

any federal retiree who had either underpaid or refused to pay the tax upon his federal pension. (No. 19).

This refund proceeding commenced on April 17, 1989. (No. 1). Simultaneous with the commencement of this refund proceeding, parallel steps were undertaken by members of the class to preserve all of their rights to relief. (R. 15, 16, 21, 23). On the same date, an action under state law and 42 U.S.C. § 1983 was commenced. *See Hogan I.* In addition, various protective filings were made with the Wisconsin Department of Justice, the legislature, the WDOR and the Wisconsin Claims Board to supplement, amend, and perfect the members of the class' entitlement to full relief for this unlawful taking. (No. 1; No. 19). The WDOR and its agents at all times relevant to this proceeding, informed federal retirees that class members had no refund right under state law. (No. 2; No. 26).

Following the decision in *Hogan I*, expressly confirming the WDOR's statutory authority to pay refunds, it refused to do so, again claiming that there was no refund right under state law. (No. 19). After the decision in *Hogan I*, the WDOR also failed to comply with its statutory obligation to provide the requisite notice to federal retirees and their legal representatives of adverse determinations, failed to act on claims within the time required by statute, bifurcated class members' claims forcing class members to pursue multiple appeals, and lost or destroyed claims and refused to acknowledge its error even when certified receipts were produced. (No. 19).

Following the WDOR's denial of the Hogans' redetermination petition, the Hogans sought individual and class refund relief from the Commission. (No. 3). The fundamental issues before the Commission were (1) whether the refund right in Wisconsin is inherently retroactive and (2) whether an adequate remedy for the respondent's unlawful deprivation was available to federal retirees before the Commission.

The Commission determined that the refund right in Wisconsin is inherently retroactive. (No. 15). Upon the WDOR's first petition for rehearing, by written decision and order, dated October 28, 1992, the Commission reaffirmed that this refund right is not subject to a prospectivity defense.[3] The Commission further held that there is an adequate remedy—a class refund remedy and certified the petitioner class. (No. 22).

On the WDOR's petition for rehearing, by written decision and order, dated February 16, 1993, the Commission affirmed its decision of October 28, 1992, holding again that there is a class refund remedy. (No. 27). Based upon the record, the mandate of *Hogan I* and this Court's pronouncements, the Commission specifically found:

> Moreover, in view of the nature of the rights in issue in this case, and the fact that this extremely large class consists, in substantial part, of elderly class members, the Commission is of the view that it is compelled to exercise its discretion in favor of certifying the class in order to protect the constitutional interests here involved.

(No. 28). (App. K at 72a).

The Commission used the notice and opt-out procedure approved by the Wisconsin Supreme Court for class actions in Wisconsin.[4] (No. 28). The record includes the names and addresses of each member of the class. (No. 37).

With respect to refunds, the WDOR asserted that it was entitled to summary judgment against the members

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[3] The WDOR did not appeal this decision within the time allowed by state law and it was not before the circuit court or the Court of Appeals. In all events, the WDOR's position is barred as a matter of federal law. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

[4] *See Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 243, 271 N.W.2d 879 (1978) (approving use of "the procedure expressly prescribed by Fed. R. Civ. P. 23(C)(2)(G)").

of the petitioner class for the years 1984 to 1988. (No. 35). The record establishes the amount of the tax overpaid which the members of the class are entitled to as refunds for each of the years 1984 to 1988. (No. 35). Based on the affidavit of its Secretary, WDOR again contended that *Davis* must be given prospective effect because it would be inequitable to require the respondent to pay the refunds owed for the years 1984 to 1988 "to all eligible claimants" in the petitioner class. (No. 35).[5]

On May 27, 1993, the Commission awarded the Hogans individually and the members of the class (including the 362 individually named petitioners) refunds of the taxes unlawfully imposed upon the class' federal pension benefits for the years 1984 to 1988, with statutory interest.

On June 17, 1993 the WDOR served and filed another petition for rehearing with the Commission regarding class certification. This petition for rehearing sought, *inter alia*, to impeach the WDOR's own positions. On June 23, 1993, the WDOR filed eight petitions for review with the circuit court. These eight petitions related to the 362 individually-named petitioners. The Commission had previously stayed proceedings in these matters for years 1984 to 1988, including consideration of petitioners' motions for intervention, pending the resolution of the adequacy of the remedy at issue in *Hogan*. (No. 7).

On June 24, 1993, the WDOR filed a ninth petition for review. This petition sought to invoke the jurisdiction of the circuit court for review of the *Hogan* proceeding

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[5] The WDOR alternatively asserted that the refund liability owed to the members of the petitioner class should be reduced so that each class member received a proportional share of the amount they would have saved if there had been no discriminatory scheme in effect for years 1984 to 1988. The WDOR's submission fixed this amount for each of the years 1984 to 1988. (No. 35). In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 42 (1990), this Court specifically rejected the WDOR's alternative methodology for calculating the class' refunds.

before the Commission. On July 29, 1993, the WDOR filed a tenth petition for review, also seeking to invoke the jurisdiction of the circuit court for review of the *Hogan* class refund proceeding.

Thereafter, the parties reached a partial settlement. Pursuant to the Stipulation of Partial Settlement, dated March 25, 1994, the WDOR's ten petitions for review were consolidated. (R. 14). Under the Stipulation of Partial Settlement, the only issue remaining in the review proceeding before the circuit court was the limited class issue reserved by the WDOR, to the extent it was still viable. Also, the WDOR is obligated to pay certain refund claims of the members of the class. (R. 16).

The threshold issue before the circuit court, therefore, was whether the circuit court had subject matter jurisdiction to entertain the WDOR's appeal of the class issue. The circuit court determined that the WDOR had failed to appeal the class issue within the time required by law and that it, therefore, lacked competency or subject matter jurisdiction. The circuit court dismissed the WDOR's appeal. (R. 29) (App. E at 28a).

Upon appeal, the Court of Appeals reversed the trial court on the timeliness issue. Also, the Court of Appeals reversed the holding of the Commission regarding its decision awarding refunds to the class. It held that the Wisconsin Supreme Court's decision in *Hogan I* did not bear in any way upon the Commission's "authority to certify a class and entertain a class refund proceeding." (App. B at 18a). It concluded that "[h]owever broad its appellate jurisdiction, the statute authorizing the commission to establish its own 'rules of practice and procedure' cannot, in our opinion, be reasonably construed to empower the commission" to entertain a class proceeding. (App. B at 20a). While the Wisconsin Court of Appeals determined that the result it reached was "unjust", its decision neither addressed the constitutional basis for the Commission's decision nor the obligation of a state court

under the Fourteenth Amendment to provide an adequate remedy where state law does not provide an adequate remedy.[6] (App. B at 21a-22a). The Wisconsin Supreme Court declined the petition for review. This petition followed.

REASONS FOR GRANTING THE PETITION

This case presents a question of substantial public importance concerning the rights of taxpayers to an adequate remedy for unconstitutional taxes. As noted by the commentators, except for the principles announced by the Court in *Reich v. Collins*, 115 S. Ct. 547 (1994); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the Court "has offered no guidance on the standard of adequacy that it intends to enforce in this arena." *See, e.g.*, K. Houghton, J. Multistate Tax., *U.S. Supreme Court Rejects State Taxpayers' Right to Attorney's Fees*, Vol. 5 (Nov.-Dec. 1995) 196, 204. This case squarely presents the Court with the opportunity to address the standard of adequacy that a state remedy must satisfy under the due process clause.

1. This case involves an issue of national importance which this Court should resolve. In *McKesson*, the Court did not have occasion to address the standard of adequacy a state remedy must satisfy under the due process clause. The Court observed that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *McKesson*, 496 U.S. at 39 n.22 (citation omitted). However, it stated that the "adequacy of this aspect of Florida's postdeprivation procedure" was not in dispute. *Id.*

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[6] The court below was also of the apparent view that the term "'plain, adequate and complete'" remedy is meaningless. *Hogan II*, 198 Wis. 2d at 814 n.14 (citation omitted). (App. B at 18a).

In this case, the adequacy of Wisconsin's newly announced postdeprivation procedure has been the central issue and has been fully developed at every stage of this refund proceeding.[7] The Commission concluded that, absent a class refund, the Wisconsin administrative remedy did not satisfy *McKesson's* "fundamental requirement of due process" that the petitioners must be heard at a meaningful time and in a meaningful manner. *McKesson*, 496 U.S. at 39 n.22. Absent such a remedy, the claims of class members would have been relegated to a " 'black hole' from which [they] may not emerge." *Coit Indep. Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 586 (1989).[8]

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[7] Prior to *Hogan I*, the Wisconsin remedy for a taxpayer constitutional challenge was a plenary suit in the circuit court for declaratory and/or refund relief. *See, e.g., Kollasch v. Adamany*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981) (free exercise of religion); *Taylor v. Conta*, 106 Wis. 2d 321, 316 N.W.2d 814 (1982) (privileges and immunities clause); *Kuhnen v. Musolf*, 143 Wis. 2d 134, 420 N.W.2d 401 (Ct. App. 1988) (privileges and immunities clause); *Capital Preservation Fund, Inc. v. Department of Revenue*, 145 Wis. 2d 841, 429 N.W.2d 551 (Ct. App. 1988) (intergovernmental tax immunity). Prior to *Hogan I*, neither the WDOR nor the Commission had any jurisdiction to provide a remedy in these cases. *See Nelson Bros. Furniture Corp. v. WDOR*, Docket No. I-8697 (1987) ("[W]e lack the jurisdiction to declare Wisconsin Statutes unconstitutional."); *Williams v. WDOR*, 10 WTAC 4 (1974) ("[Q]uestions of constitutionality . . . [are] reserved to a court of competent jurisdiction."); *Wolfe v. WDOR*, 10 WTAC 26, 27 (1974) ("[The Commission] is not a constitutionally-mandated body and therefore is without the power to rule on the constitutional validity of any duly-enacted statute.").

[8] The Commission's findings as to the inadequacy of the state remedy are also fully supported by two recent studies commissioned by the Chief Justice of the Wisconsin Supreme Court. These studies demonstrate that the protections once afforded in Wisconsin have now eroded to the point that the problem of delay in agency proceedings alone often renders a right to relief meaningless. *See Report of the Wisconsin Equal Justice Task Force*, 29-34 (Jan. 1991). Three sitting members of the Wisconsin Supreme Court were members of this Task Force. *See also Report of Wis-*

Here, as the result of the Wisconsin Court of Appeals' failure to provide an adequate judicial remedy, if each class member were required to contest his or her claims individually, it would take well over 25 years [9] just for the members of the class to get through the Commission, *assuming no other cases were entertained* by the Commission.[10] Moreover, given the disqualification in this case of two out of the three sitting Commissioners, it would have been impossible for the Commission to have maintained its historical rate of disposing of class members' cases.

Absent review by this Court, the remedy to which the petitioners have now been relegated is wholly ineffective. Recognizing that the WDOR established that there were no facts in dispute regarding the questions of refunds, thousands of elderly citizens must now pursue individual cases which is the equivalent of providing them no remedy at all.[11] Over 3,000 members of the Class have

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consin Supreme Court Gender Equality Committee, 62 (July 1995) (noting that these deficiencies remain).

[9] During the five year period preceding this case, an average of 578 new cases were filed in each year with the Commission and an average of 558 cases were disposed of each year. *See State of Wisconsin 1991-1993 Biennial Report of the Tax Appeals Commission*, at 8 (R. 35A). At the time the Commission's decisions were rendered in this case, the Commission had a backlog of 634 other cases. *Id.* at 10. This analysis assumes the good faith of the WDOR. However, the strategy the WDOR attempted to pursue was the bifurcation of claims by years, thereby forcing class members to vindicate separately each year claimed. If this strategy had prevailed below, the process would take five times as long—over 125 years. And this would occur if the Commission decided class members' cases *only*.

[10] Even this analysis significantly understates the actual delay because the historical rate of case disposition is based on a *five* member Commission. After the decision in *Hogan I*, by legislation the Commission was reduced from five members to three members.

[11] Petitioners' counsel has over 4,200 individual cases of class members pending before the Commission. The respondent has obtained a stay of those cases pending the resolution of this case.

already died and that number increases daily. *See, e.g.*, Hogans' Motion to Advance, September 1, 1995. It is a statistical probability that most of the petitioners will be dead before this matter is resolved.

Of course, in the first instance a state remedy, such as the one here, which is determined to be "tortured and troubling" (App. E at 28a; App. B at 3a) and "unjust" (App. B at 21a-22a) cannot be said to ever satisfy the due process standard of " 'clear and certain remedy' ". *McKesson*, 496 U.S. at 39 (citation omitted). Similarly, a state remedy that is "unjust" can never be held to be a "meaningful" remedy. *Id.*[12] Where, as here, taxpayers have made a "reasonable attempt" to obtain a meaningful remedy for the "unlawful" tax (App. B at 22a), under the principles announced by this Court in *McKesson* and *Reich*, the denial of an adequate remedy by the Court of Appeals was itself a violation of the Fourteenth Amendment. *See Reich v. Collins*, 115 S. Ct. 547, 549 (1994) (" '[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment.' ") (citation omitted).[13]

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[12] Likewise, conditioning the availability of an adequate state remedy upon the source of the right asserted should not satisfy the due process standard for adequacy. *See McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 234 (1934) ("A state may not discriminate against rights arising under federal laws."). Here, those seeking to vindicate an unlawful deprivation in violation of a federal right have been denied the adequate remedy of a class action while a similar class action brought by state retirees for an unlawful deprivation of a state right has been affirmed by the Court of Appeals. *Wisconsin Retired Teachers Ass'n, Inc. v. Employe Trust Funds Bd.*, 195 Wis. 2d 1001, 537 N.W.2d 400 (Ct. App.), *review granted*, 540 N.W.2d 200 (1995). Similarly, the Court of Appeals has ordered class relief where state officials have refused to provide a state-created right to state teachers. *Benson v. Gates*, 188 Wis. 2d 389, 525 N.W.2d 278 (Ct. App. 1994).

[13] Even in the absence of the WDOR's concession before the circuit court, "[a] State that 'establish[es] various sanctions and

This Court should grant the petition to address the standards of adequacy, including the standard of a meaningful time, which state remedies must satisfy under the due process clause. Absent such review, states will continue to have the power to nullify the " 'supreme Law of the Land,' " by simply burying meritorious claims for unlawful deprivations in their administrative holes. *McKesson*, 496 U.S. at 29 (citation omitted).

Moreover, absent guidance from this Court, there is little chance that the necessary reforms in state tax administration identified by the American Bar Association's Section of Taxation over six years ago will ever be considered, let alone implemented by the States. *See* SECTION OF TAXATION REPORT TO HOUSE OF DELEGATES, August, 1990 at 2 (finding that for years taxpayers have objected to perceived unfair and arbitrary treatment in compliance, assessment, and appeals of state and local taxes and identifying a need for States to give serious consideration to the procedural rights of taxpayers).

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summary remedies designed' *to prompt* taxpayers to 'tender . . . payments before their objections are entertained or resolved 'does not provide taxpayers' *a meaningful opportunity* to withhold payment and to obtain a predeprivation determination of the tax assessment's validity." *Harper*, 113 S. Ct. at 2519-20 n.10 (1993). (R. 35). It is unmistakably clear that Wisconsin has adopted a panoply of interest, penalty and sanctions provisions " 'designed' to prompt taxpayers to 'tender . . . payments before their objections are entertained." ' *Id. See, e.g.*, Wis. Stats. §§ 71.82, 71.83 (App. R. 144a-148a). Wisconsin's penalty scheme is more onerous than the Georgia scheme at issue in *Reich*:

> Penalties for Not Filing Returns or Filing Incorrect Returns
> If you do not file an income tax return which you are required to file, or if you file an incorrect return due to negligence or fraud, penalties and interest may be assessed against you. The interest rate on delinquent taxes is 18% per year. Civil penalties can be as much as 100% of the amount of tax not reported on the return. Criminal penalties for failing to file or filing a false return include a fine up to $10,000 and imprisonment.

Wisconsin Income Tax Form 1 Instructions '95, at 23.

2. In *National Private Truck Council, Inc. v. Oklahoma Tax Com'n*, 115 S. Ct. 2351 (1995), this Court resolved the "conflict among the state courts as to whether, in tax cases, state courts must provide relief under § 1983 when adequate remedies exist under state law." *Id.* at 2354. In resolving this issue, it was unnecessary for this Court to address the issue of what is adequate. *National Private Truck Council*, 115 S. Ct. at 2355 ("Petitioners do not dispute that Oklahoma has offered an adequate remedy. . . ."). This Court, relying on the principles and reasoning of its decision in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), held that "state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy." *National Private Truck Council*, 115 S. Ct. at 2357. However, in *Fair Assessment* this Court also had no occasion to address the adequacy of the available state remedy. *Fair Assessment*, 454 U.S. at 116 ("the adequacy of available Missouri remedies is not at issue in this case."). Consequently, this Court has never had occasion to harmonize the differing adequacy standards for comity and the Tax Injunction Act, 28 U.S.C. § 1341, which govern the federal courts, and the standards of adequacy under the Fourteenth Amendment which govern state courts.[14] This case presents a compelling example supporting the need for this Court to grant the writ to provide both federal and state courts needed guidance.

In *Hogan I*, the same petitioners were denied relief under 42 U.S.C. § 1983 and state law because the recon-

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[14] Under the Tax Injunction Act, the standard is only concerned with "certain minimal *procedural* criteria." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981). However, based on this Court's decisions under the Fourteenth Amendment, the due process standard should be substantively more rigorous. *See e.g., McKesson*, 496 U.S. at 39. *Cf. Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320 (1994). ("Takings Clause . . . should [not] be relegated to the status of a poor relation . . . .").

figured state remedy first announced in *Hogan I* was held to be an adequate remedy. *See Hogan I*, 163 Wis. 2d 1 at 27 ("The plaintiffs have a plain, adequate, and complete remedy through these administrative remedies in which they may obtain relief for any violation of their federal rights.").[15] In *Hogan I*, the Wisconsin Supreme Court specifically extended to the Commission the power to decide constitutional issues. *Id.* at 21.[16] As a result, after *Hogan I*, the Commission was vested with exclusive original jurisdiction over all Wisconsin tax matters. *Id.* at 24. This extension of its jurisdiction vested the Commission with the power to insure the "uniform application" of the tax laws to the petitioners. *See Sawejka v. Morgan*, 56 Wis. 2d. 70, 80-81, 201 N.W. 2d 528 (1972).

Yet, in the decision below in *Hogan II*, the Wisconsin Court of Appeals neither considered the Tax Injunction Act standard nor the federal constitutional standard applied by the Commission in ordering that all petitioners must receive the adequate remedy of refunds. As a consequence of the Wisconsin Court of Appeals' failure to consider, let alone address, these issues, the petitioners in *Hogan II* have been relegated to yet another reconfigured remedy which neither satisfies the Tax Injunction Act standard nor the Fourteenth Amendment standard of adequacy.

For example, central to the Wisconsin Supreme Court's holding in *Hogan I* was the WDOR's representation that the reconfigured Wisconsin remedy urged by the WDOR satisfied all the requirements of federal law, including, specifically, the "speedy" requirement under the Tax Injunction Act. *See, e.g.*, WDOR's *Hogan I* Supreme Court Brief, at 14 n.4 ("State law remedies available to Wis-

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[15] In so holding, the Wisconsin Supreme Court observed that the standard for comity is the equivalent of the "plain, speedy and efficient" standard under the Tax Injunction Act. *Id.* at 20 n.5 (citing *Fair Assessment*, 454 U.S. at 116 n.8).

[16] See n.7, *supra*.

consin income taxpayers far surpass the standards established by the United States Supreme Court in order to obviate § 1983 jurisdiction in tax cases." Citing *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981)); WDOR's *Hogan I* Petition for Review, at 18 n.2 (same).

Consistent with the Wisconsin Supreme Court's mandate in *Hogan I* and the decisions of this Court, the Commission concluded that absent a class remedy, Wisconsin's administrative remedy did not satisfy the "speedy" requirement. A two-year delay between a taxpayer's refund claim and a *final judicial adjudication* of the claim under state law has been characterized as "barely" adequate to qualify as a *speedy* remedy. *Rosewell*, 450 U.S. at 529 (Blackmun, J., concurring).[17] Here, given its docket, it was impossible for the *Rosewell* two-year guideline to be satisfied at the Commission level for the individually docketed cases of the class representatives and the individually named petitioners, let alone for the thousands of other members of the class. (No. 22; No. 27; R. 35A). And this, of course, altogether ignored the time spent before the WDOR and the time required for circuit court review, all of which must be taken into account under *Rosewell*'s two-year guideline.

This Court should grant review to provide guidance to state courts and legislatures on this issue of demonstrated difficulty. Such guidance will further the policy of federal non-interference in matters of state taxation by providing standards against which the states may measure the adequacy of their remedies in meeting their constitutional obligation to provide taxpayers a " 'clear and certain

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[17] If a state's remedy fails any *one* of the Tax Injunction Act requirements, it is an inadequate remedy for purposes of the Tax Injunction Act. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 517 (1981) (" '[U]ncertainty' surounding a state court remedy lifts the ban on federal court jurisdiction.") (citation omitted); *Garrett v. Bamford*, 538 F.2d 63, 67 (3d Cir. 1976), *cert. denied*, 429 U.S. 977 (1976) ("[I]t is sufficient for a finding of inadequacy that the availability of the state remedy be merely uncertain.").

remedy' " that is "meaningful." *McKesson*, 496 U.S. at 39 (citation omitted). In addition, such guidance will have the salutary effect of minimizing the burden upon federal courts to provide a federal remedy, because of the continuing failure of state courts to provide an adequate remedy. *See, e.g., Barringer v. Griffes*, 964 F.2d 1278 (2d Cir. 1992) (federal remedy provided where state failed to provide an adequate remedy in the wake of this Court's decision in *Williams v. Vermont*, 472 U.S. 14 (1985)); *Northwest Airlines, Inc. v. Tennessee State Bd. of Equalization*, 11 F.3d 70 (6th Cir. 1993) (federal remedy provided because under state remedy a full judicial hearing of the taxpayers' claims is not available).

3. This Court should also grant review to resolve whether a state court may refuse the federal remedy under 42 U.S.C. § 1983 on the basis that there is an adequate state remedy and then deny those taxpayers that adequate state remedy in subsequent proceedings. Here, petitioners were denied the federal remedy in *Hogan I* because of the Wisconsin Supreme Court's announcement of a new adequate state remedy. However, in the decision below in *Hogan II*, the Wisconsin Court of Appeals again reconfigured the state remedy to deny the petitioners the very remedy which had been held to be available to all petitioners in *Hogan I*. This result is no less offensive simply because *Hogan I* principally involved the § 1983 remedy rather than the state remedy at issue in *Reich v. Collins*, 115 S. Ct. 547 (1994). In both cases, the end result is that taxpayers have been denied an adequate remedy because the state reconfigured "its scheme, unfairly, in midcourse . . . ." *Id.* at 550.[18]

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[18] In this respect, it is incontrovertible that the Court of Appeals reconfigured the state scheme. The Wisconsin legislature has never permitted any agency in Wisconsin to adopt a rule precluding class actions. In the only reported instance of an agency attempting to adopt a formal rule to preclude class actions in the administrative process, the agency was precluded from doing so by the legislature's Joint Committee for Review of Administrative Rules. *See* OAG

Here, even assuming that the Wisconsin Court of Appeals holding regarding the state administrative remedy is correct, the Wisconsin Court of Appeals was still required under the Tax Injunction Act standard to provide an adequate remedy. Under this procedural standard, the Court of Appeals should have provided a full judicial determination of the petitioners' claims of inadequacy. *Northwest Airlines, Inc. v. Tennessee State Board of Equalization*, 11 F.3d 70, 73 (6th Cir. 1994). It was likewise obligated to do so under the due process standard. *McKesson*, 496 U.S. at 39 n.22.

4. The result reached below by the Wisconsin Court of Appeals also conflicts in principle and result with the decision of the Florida Supreme Court in *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994), *cert. denied*, 115 S. Ct. 2608 (1995). The positions advanced by the WDOR and adopted by the Wisconsin Court of Appeals below are virtually identical to those advanced in *Kuhnlein* by the Florida Department of Revenue. In *Kuhnlein*, the Florida Supreme Court rejected Florida's invitations to deny the members of the taxpayer class an adequate remedy based upon considerations of state law. In awarding the taxpayers the adequate remedy of refunds, the Florida Supreme Court held: "[s]overeign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will." *Id.* at 721. Consistent with its constitutional obligation to provide an adequate

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61-81, 70 Op. Att'y Gen. 250, 255 (1981) ("The Joint Committee for Review of Administrative Rules objected to the proposed rule . . . ."). The legislature specifically empowered the Commission to prescribe its own procedural rules. Wis. Stat. § 73.01(4)(b). The Commission's rule TA 1.39 Wis. Adm. Code, adopting § 803.08 (the class action statute), was adopted in accordance with Wis. Stat. § 227.018 (1979-80) and was specifically approved by the legislative committees of both the Assembly and the Senate. (R. 35A).

remedy, notwithstanding its rejection of the § 1983 remedy, the Florida Supreme Court held: "[t]he only clear and certain remedy is a full refund to all who have paid this illegal tax." *Id.* at 726. Unlike *Kuhnlein,* the Wisconsin Court of Appeals, by failing to consider the constitutional question of adequacy, permitted state law, by default, to supersede the petitioners' constitutional right to an adequate remedy.

Thus, review should be granted by this Court to resolve the conflict of whether a state court, consistent with its obligations under the Supremacy Clause, may ever decline to provide an adequate remedy to taxpayers who have been unconstitutionally taxed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Wisconsin Court of Appeals, District IV, should be granted.

Respectfully submitted,

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June 7, 1996

APPENDICES

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT
231 E. State Capitol
Madison, Wisconsin 53701-1688
Telephone 608-266-1880

March 12, 1996

No. 95-0438
L.C. #93CV2532

DOR

v.

HOGAN

ORDER

Motions to file amicus briefs having been filed by Wisconsin Education Association Council, Wisconsin Military Retirees Alliance and Wisconsin Academy of Trial Lawers; a motion for a one-day extension of time in which to file a response to petition for review having been filed on behalf of petitioner-appellant, Wisconsin Department of Revenue; and a petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of respondents-respondents-petitioners, J. Gerard Hogan and Delores M. Hogan, et al.; and all considered by the court,

IT IS ORDERED that the motions are granted.

IT IS FURTHER ORDERED that the petition for review is denied, without costs.

MARILYN L. GRAVES
Clerk of Supreme Court

APPENDIX B

[Filed Dec. 21, 1995]

STATE OF WISCONSIN
IN THE COURT OF APPEALS
DISTRICT IV

No. 95-0438

WISCONSIN DEPARTMENT OF REVENUE,
Petitioner-Appellant,

v.

J. GERARD HOGAN, and DELORES M. HOGAN, *et al.*,
Respondents-Respondents.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Reversed and remanded with directions.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

EICH, C.J. We hold in this case that the Wisconsin Tax Appeals Commission lacks authority to entertain a class-action proceeding seeking refunds of state income taxes collected over the years on the pension income of retired federal government employees living in Wisconsin.

The appeal is from a judgment of the Dane County Circuit Court dismissing a petition by the Wisconsin Department of Revenue for judicial review of the commission's decision and order directing that refunds be paid to the class comprising all persons whose federal pensions had been taxed by the state. The court, ruling that the petition had not been filed within the time pre-

scribed by statute, entered judgment dismissing the review proceeding and remanded the case to the commission for implementation of its refund order.

We reverse the judgment and remand to the circuit court with directions to enter judgment reversing the commission's decision.

I. Facts and Procedural History

The trial court aptly described this case as traveling a "tortured . . . journey" through the agencies and various courts.

The Hogans filed an attachment to their 1988 state income tax return indicating that they were paying the tax on their federal pensions under protest, citing the United States Supreme Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989). *Davis* held that state taxation of federal retirement income violated federal law and principles of intergovernmental tax immunity. *Id.* at 817. The Hogans subsequently filed a refund claim for tax years 1985 through 1988.

Several months after they filed their individual refund claim, the Hogans and several other federal retirees living in Wisconsin commenced a class action in circuit court under 42 U.S.C. § 1983, claiming, as they did in their case before the department, that the *Davis* decision entitled them to a refund of state income taxes collected on their federal retirement benefits over the years. They also sought damages for "money had and received" under state law.

The circuit court issued an order certifying the class and enjoining the department from taxing any of the plaintiffs' retirement benefits pending trial on the merits of the plaintiffs' claims. The supreme court reversed, dismissing the plaintiffs' action on grounds that they had failed to exhaust their state administrative remedies before proceeding in court under § 1983. *Hogan v. Musolf*,

163 Wis.2d 1, 27, 471 N.W.2d 216, 226 (1991), *cert. denied*, 502 U.S. 1030 (1992).[1]

In early 1991, while *Hogan* was still pending in the circuit court, the Hogans wrote to the department stating that they were changing their individual refund claim to one seeking refunds on behalf of the class certified by the circuit court in *Hogan*.[2] The department denied the purported "amendment," concluding that state law did not authorize the prosecution of class-action refund claims before the department. The denial was appealed to the department's appellate bureau, where it was confirmed.

The Hogans then appealed the bureau's denial to the tax appeals commission. The department moved to dismiss the appeal, and the Hogans moved for an order "recognizing the class as certified in *Hogan*[] . . . and directing that th[e] case continue [before the commission] as a class action . . . ."

On October 28, 1992, the commission denied the department's motion to dismiss and granted the Hogans' motion to recognize and certify the class. The order was not accompanied by the notice of appeal rights specified in § 227.48(2), STATS., as a precondition for commencing the time limits in which petitions for rehearing or judicial review may be commenced.[3] Thereafter, the

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[1] In 1989, the legislature added payments from federal civil service and military retirement systems to the list of retirement benefits exempt from income taxation under §71.05(1), STATS., 1989 Wis. Act 31, § 1817m. The law did not affect the liability of federal retirees for pre-1989 taxes, however.

[2] In their brief, the Hogans estimate the class at something in excess of 25,000 persons, including over 20,000 retired civilian employees and survivor annuitants of deceased retirees, and over 5,000 military retirees.

[3] Section 227.48(2), STATS., provides that agency decisions "shall include" a notice of the right to petition for rehearing and judicial review and that the time limitations for filing rehearing petitions under § 227.49(1), STATS., or petitions for judicial review under

commission clarified its class-certification order and then clarified it again, each time modifying and altering the underlying rationale. Like the October 28 order, none of the amended orders was accompanied by a § 227.48 (2) notice.

On November 20, 1992, the department filed a "Respondent's Rehearing Petition" with the commission. The commission treated the petition as a motion for reconsideration and denied it in a lengthy decision restating its earlier conclusion that it possessed statutory authority to certify a class and entertain a class refund proceeding. The order dismissing the department's motion was also unaccompanied by a § 227.48(2), STATS., notice.

The Hogans moved the commission for summary judgment on behalf of the class on the merits of their claim, seeking a determination that all class members were entitled to refunds. On May 27, 1993, Commissioner Thomas Timken rendered an oral decision granting the motion and ordering refunds to all members of the class, together with statutory interest.[4] Unlike all the decisions

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§ 227.53(1)(a), STATS., do not begin to run "until the agency has complied with this subsection."

Section 227.49(1), STATS., states that a party aggrieved by a final agency order may petition for rehearing within twenty days after service of the order. Section 227.53(1)(a)2, STATS., provides that, where no rehearing petition is filed, an aggrieved party must file a petition for judicial review of the order within thirty days after service of the order and that "[i]f a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing . . . ."

[4] By this time, Timken was the sole member of the commission remaining on the case, all others having either recused themselves or left the commission in the interim.

He proceeded to decide the motion under § 73.01(4)(dn), STATS., which authorizes any member of the commission, with the consent of the parties, to render an oral decision in any matter pending before the agency, and provides:

preceding it, the transcript of the Timken decision provided to the parties was accompanied by the § 227.48(2), STATS., notice.

On June 16, 1993, twenty days after the oral decision, the department filed a petition for rehearing.[5] Timken denied the petition in a written decision issued on June 29, 1993, and the department filed a petition for judicial review within thirty days of that date.

The circuit court ruled that the department's petition for judicial review of the Timken decision was untimely because it was not filed within thirty days of the date the decision was rendered. The court rejected the department's argument that because it had petitioned for rehearing, the thirty-day limit was extended under § 227.53 (1)(a), STATS.,[6] concluding the oral-decision statute under which Timken proceeded, § 73.01(4)(dn), did not contemplate petitions for rehearing. The court affirmed Timken's decision and this appeal followed. (Other facts will be referred to in the body of the opinion.)

II. Timeliness of the Petition for Judicial Review

The trial court's decision that the department's petition for judicial review was not timely filed involves the application of statutory and other legal principles to the

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> Any party may appeal such oral decision as provided in s. 73.015. Oral decisions constitute notice for purposes of determining the time in which appeals may be taken. Provisions of this section ch. 227 in conflict with this paragraph do not apply to decisions rendered under this paragraph.

Section 73.015, STATS., referred to in the statute, states simply that "[a]ny adverse determination of the tax appeals commission is subject to review in the manner provided in ch. 227."

[5] The Hogans contend that the June 16th filing was ineffective because the other parties were not served until the 17th, which was one day beyond the thirty-day deadline. As will be seen below, we reject that argument.

[6] *See supra* note 3.

facts of the case. It is a question of law, which we decide de novo. *See Braatz v. LIRC*, 174 Wis.2d 286, 293, 496 N.W.2d 597, 600 (1993).

The Hogans' arguments on the question are based on the department's failure to seek judicial review of the commission's October 28, 1992, decision denying the department's motion to dismiss the appeal and granting the Hogans' motion for certification of the class. They point out that the department's petition for rehearing of that decision was denied on February 16, 1993, and no appeal was taken within thirty days thereafter. According to the Hogans, this failure deprives the circuit court of competency to hear any challenge to the commission's decision to entertain the class-action refund proceeding.

The department argues, on the other hand, that the class-certification order was not final but interlocutory in nature, and thus was not an "administrative decision[] which adversely affect[ed] the substantial interests of [the department]" within the meaning of § 277.52, STATS., the statute governing judicial review of agency actions.[7]

It is well settled that "not all decisions, orders or determinations which might fit within a literal reading of [§ 227.52] are subject to judicial review." *Friends of the Earth v. Public Serv. Comm'n*, 78 Wis.2d 388, 404, 254 N.W.2d 299, 305 (1977). Nor does the form of the order, or the label the agency happens to place upon it, determine whether it starts the thirty-day clock ticking. *YMCA of Beloit v. DOR*, 141 Wis.2d 907, 911, 417 N.W.2d 39, 41 (Ct. App. 1987). An appealable agency decision under § 227.52, STATS.—one "adversely affect-[ing] the substantial interests of any [party]"—is one that is "final and complete" in the sense that it " 'determine[s] the further legal rights of the [party] seeking

[7] Section 227.52, STATS., states, "Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter . . . ."

review.'" *Id.* at 911, 912, 417 N.W.2d at 41 (quoted source omitted).

> [T]he legislature did not intend to authorize the review of mere preliminary action by an agency. "Instead, the legislative intent [underlying § 227.52] was to limit judicial review of administrative agency actions to 'final orders' of the agency."

Madison Landfills, Inc. v. DNR, 180 Wis.2d 129, 139, 509 N.W.2d 300, 304 (Ct. App. 1993) (quoted source omitted).

A preliminary or interlocutory order—one that does *not* start the clock running—is an order "whe[re] the substantial rights of the parties involved in the action remain undetermined and whe[re] the cause is retained for further action." *Pasch v. Department of Revenue*, 58 Wis.2d 346, 354, 206 N.W.2d 157, 161 (1973) (footnote omitted).

> "'Courts are averse to review interim steps in an administrative proceeding. . . . [R]eview of preliminary or procedural orders is generally not available, primarily on the ground that such a review would afford opportunity for constant delays in the course of administrative proceedings for the purpose of reviewing mere procedural requirements or interlocutory directions. Broad language of statutes providing for judicial review of orders of regulatory commissions has been construed as not extending to every order which the commission may make, and mere preliminary or procedural, as distinguished from final, orders have been held not to be within such statutes, especially where the context of the provision indicates that the orders for which review is provided are such as are of a definitive character dealing with the merits of a proceeding . . . .'"

Id. at 354-55, 206 N.W.2d at 161 (quoting *Wisconsin Tel. Co. v. Wisconsin Employment Relations Bd.*, 253

Wis. 584, 591, 34 N.W.2d 844, 847 (1948)) (internal quoted source omitted).

In *Pasch*, the appeal was from "an order which determined that the commission had the authority to proceed to a hearing and determination upon the merits," *id.* at 355, 206 N.W.2d at 162, and the court held that such an order was not reviewable under ch. 227:

> The order of the commission finding jurisdiction . . . to proceed to a hearing upon merits of the controversy does not directly affect the legal rights, duties or privileges of the appellant. As provided in sec. 227.20, Stats., the jurisdiction of the commission may be challenged upon review from the final decision of the commission upon the merits of the controversy. Appellant argues that the issue of the commission's jurisdiction should be finally determined before appellant is put to the expense and inconvenience of a lengthy proceeding before the commission . . . . We are mindful of the fact that much time and expense might be saved if the courts would decide at this time that the commission had exceeded its jurisdiction; however, this consideration is outweighed by the resultant delay that would accompany review of these agency determinations and the disruption of the agency's orderly process of adjudication in reaching its ultimate determination.

Id. at 357, 206 N.W.2d at 162-63.

The Hogans have not persuaded us that the commission's order purporting to certify the class is a final, appealable order within the meaning of § 227.52, STATS., and the applicable cases. Rather, we see it as a decision to continue with the proceedings—as a class action—to a determination of the merits of the controversy: whether, and in what amount, refunds are to be paid to the applicants. And the fact that the commission certified the class does not necessarily determine the entitlement to specific refunds. In our view, the October 28, 1992, order is

much more akin to the type of "jurisdictional" order the *Pasch* court held to be interlocutory in nature and thus not appealable under ch. 227, STATS. And we note in this regard that the commission did not include with its decision the appeal-rights notice under § 227.48(2), STATS., see *supra* note 3, and, further, that the order itself set "[a] scheduling conference for further proceedings" in the case.[8]

On the other hand, the Timken oral decision of May 27, 1993, which held that the state had illegally collected income taxes on class members' federal pensions over the years and granted the Hogans' motion for judgment ordering refunds to the class, is unquestionably a final, appealable order under § 227.52, STATS., and there is no question that the department's petition for review of the Timken decision was filed within thirty days of the commission's denial of its petition for rehearing of that decision.

The Hogans argue, however, that we should nonetheless consider the petition untimely for two reasons: first, because the petition for rehearing itself was not "properly" filed within twenty days of the decision and thus was a nullity which cannot toll the thirty-day requirement for filing a petition fer review;[9] and, second, because the

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[8] It is instructive that, in the federal courts, orders granting certification are not considered final "in part because every certification is subject to continuing reconsideration up to the time of final judgment." 15B WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE, § 3914.19, at 63 (1992).

Finally, we note that in their arguments on the merits of the commission's authority to certify a class, the Hogans themselves argue that "[c]lass certification 'is a *procedural right only*, ancillary to the litigation of substantive claims'" (emphasis the Hogans') (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 345 (1980) (Powell, J., dissenting), and also citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 912-13 (9th Cir. 1964)).

[9] As noted *supra* note 3, § 227.53(1)2, STATS., requires petitions for review to be filed within thirty days after service of the agency

oral-decision provisions of § 73.01(4)(dn), STATS., do not permit petitions for rehearing.

As for the first, the Hogans contend that the rehearing petition "was not properly served or filed until June 17, 1993—one day after the last date for filing and service." As we have noted above, the record establishes that the petition was filed on June 16, 1993—twenty days from the date of the Timken oral decision. The Hogans argue, however, that the petition was not "properly" filed on that date because, contrary to the requirements of § 227.49 (4),STATS., the department did not serve copies on counsel for the class until the following day, which, as indicated above, was the twenty-first day.

Section 227.49(4), STATS., does not require that, in addition to filing the petition within twenty days, it must also be served on the other parties to the proceeding within that time. All the statute says is that: (1) the person or entity seaking rehearing "may, within 20 days after service of the order, file a . . . petition for rehearing"; and (2) in a separate subsection, "[c]opies of petitions for rehearing shall be served on all parties of record." Section 227.49(1) and (4), STATS.

The Hogans offer no authority for the proposition that a petition properly filed with the commission within the twenty-day time limit must be considered a nullity under § 227.49, STATS., if service on the parties of record is not also completed by the twentieth day. As the department points out, when the legislature has intended such a result, it has plainly stated that intent in the statute itself. The provisions dealing with service and filing of petitions for judicial review, for example, expressly state that the peti-

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decision, unless rehearing is requested under § 227.49—in which case the petition for review must be filed within thirty days of the decision disposing of the rehearing application. And § 227.49(1) requires a petition for rehearing to be filed within twenty days of the decision.

tion "shall be *served and filed* within 30 days" of the decision sought to be reviewed. Section 227.53(1)(a)2 (emphasis added). The Hogans do not explain why, if the legislatuure had intended to impose a similar requirement in § 227.49, it did not say so, and they have not persuaded us that the department's rehearing petition was not timely filed.

As for their argument that, as the circuit court ruled, the rehearing petition cannot toll the thirty-day limit for petitions for review because rehearings are not permitted by § 73.01(4)(dn), STATS., they have offered no authority to support the proposition, other than the unamplified statement that the statute "*expressly* precludes petitions for reconsideration of oral decisions" (emphasis the Hogans') and a brief quotation from the trial court's decision so concluding.

We have referrred to § 73.01(4)(dn), STATS., see *supra* note 4. It states that an oral decision may be appealed as provided in ch. 227; that the decision itself constitutes a notice for determining applicable time periods "in which appeals may be taken"; and that other provisions of § 73.01 or ch. 227 "in conflict with this paragraph" do not apply to such an oral decision.

Contrary to the Hogans' assertion, we see nothing in the statute "expressly" prohibiting petitions to rehear an oral decision.[10] We think it would indeed be poor policy to bar rehearing or reconsideration of agency decisions merely because they are rendered orally, rather than in writing.

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[10] We do not agree that the statement in the statute that other provisions of ch. 227 that are "in conflict" with § 73.01(4)(dn) are inapplicable may be considered an "express" bar to rehearing petitions simply because such petitions are authorized elsewhere in ch. 227. Ae we discuss in greater detail below, we see no "conflict" between the oral-hearing provisions of § 73.01(4)(dn) and the rehearing provisions of § 227.49. Indeed, as may be seen, we see them as highly complementary.

The purpose of a rehearing is to enable the agency to correct any errors in the proceedings before the case goes any further in the adjudicative process. *Village of Cobb v. Public Serv. Comm'n,* 12 Wis.2d 441, 458, 107 N.W. 2d 595, 604 (1961). We agree with the department that to hold that rehearing requests are not permitted where the decision is rendered orally under § 73.01(4)(dn) would render the commission powerless to correct mistakes made in a single-commissioner proceeding at the request of one of the parties. Denying the parties the opportunity to ask the agency to correct claimed errors in its decision, and requiring them instead to sue in circuit court, would be contrary to the goals of judicial economy and the efficient resolution of tax disputes.

In *Metropolitan Greyhound Management Corp. v. Racing Bd.,* 157 Wis.2d 678, 460 N.W.2d 802 (Ct. App. 1990), we rejected the argument that a circuit court lacks the authority to reconsider its decision in a judicial review proceeding after the decision has been appealed. We reasoned as follows:

> Motions for reconsideration pending appeal serve an important function. First, a trial court's reconsideration may obviate the necessity for an appeal. If so, the parties are not only spared unnecessary expense, but the interests of judicial economy are served as well. Second, even if an appeal is not avoided, a motion for reconsideration that challenges the trial court's decision can hone its analysis, and thus assist appellate review. There is nothing in the law or in logic that persuades us of an intent to exclude judicial review of administrative agency determinations of these benefits.

Id., at 698-99, 460 N.W.2d at 811. We think that reasoning is equally applicable here.

Finally, we note that the commission itself advised the parties that they had a right to petition for rehearing

of the Timken decision.[11] And, once the petition was filed, the commission proceeded to consider and decide it. In light of these considerations, we find unpersuasive the Hogans' argument that rehearing petitions are not permitted in oral dispositions under § 73.01(4)(dn), STATS.

We therefore reverse the trial court's ruling that the department's petition for review was untimely filed.[12]

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[11] The notice of appeal rights accompanying the Timken decision, in addition to informing the parties of their right to seek judicial review, also states that "[a]ny party has a right to petition for a rehearing of this decision within 20 days . . . ."

[12] The Hogans also argue that the department should be estopped from petitioning for review of the May 27, 1993, Timken decision (or, more properly, from the denial of its petition for rehearing of that decision), because it had also sought rehearing of the commission's October 28, 1992, decision certifying the class. According to the Hogans, a petition for rehearing under § 227.49(1), STATS.—which states that "[a]ny person aggrieved by a final [agency] order" may petition for rehearing—assumes the finality, and thus the appealability, of the order. They see such action as constituting a position that is inconsistent with the position the department now takes—that is, that the 1992 decision was not a final order for purposes of a ch. 227 review proceeding—and they claim that the department should be prohibited from so arguing under the rule of judicial estoppel.

Judicial estoppel is "an equitable remedy" which "precludes a party from asserting a position in a legal proceeding that is inconsistent with a position previously asserted." *Coconate v. Schwanz*, 165 Wis.2d 226, 231, 447 N.W.2d 74, 75 (Ct. App. 1991). The rule, however, does not reach conclusions of law, see *Fletcher v. Eagle River Memorial Hosp.*, 156 Wis.2d 165, 178, 456 N.W.2d 788, 794 (1990), and it applies only in situations where the challenged actions constitute "cold[]manipulat[ion]," rather than mistake or inadvertence. *State v. Fleming*, 181 Wis.2d 546, 558, 510 N.W.2d 837, 841 (Ct. App. 1993). By its 1992 rehearing petition, the department was essentially seeking reconsideration of the commission's interlocutory ruling on class certification, and even if it could be considered that the motion, or its title, had great legal significance, we have been provided with no evidence that the department's description of its motion as one for "rehearing under sec. 227.49" was anything other than inadvertent, much less the

III. The Commission's Authority to Certify the Class

Because the circuit court dismissed the department's petition for lack of subject matter jurisdiction (competency to proceed), based on its conclusion that the petition for review had not been timely filed, the court did not consider whether, as a matter of law, the commission has the authority to certify and entertain a class action in refund proceedings. Pointing to the statement in § 227.58, STATS., that, on appeal from the circuit court's judicial review of an agency decision, the court of appeals "review[s] . . . the final judgment of the circuit court," the department argues that we may not consider the issue because it was not encompassed in the court's judgment.

The extent of the commission's statutory authority is a question of law, and legal issues are generally reviewed de novo on appeal. *Debeck v. DNR*, 172 Wis.2d 382, 386, 493 N.W.2d 234, 236 (Ct. App. 1992). Because we review the legal basis for the commission's decision independently, and because the parties have fully briefed the issue, we proceed to decide it.

In concluding that it had authority to certify a class on the Hogans' appeal, and to proceed with the appeal as a class action, the commission reasoned as follows: (1) Section 73.01(4)(b), STATS., provides that commission proceedings "shall be conducted in accordance with rules of practice and procedure described by the commission"; (2) one such rule prescribed by the commission is WIS. ADM. CODE § TA 1.39, which states that "the practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state"; and (3) because the statutes and rules applicable to circuit courts include provisions for certifica-

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result of "cold[]manipula[tion]." Indeed, the commission treated the motion as one for reconsideration, titling its decision: "Ruling and Order on Motion for Reconsideration."

tion of class actions, the commission has authority to do the same in refund proceedings. The department argues that such a conclusion is without legal foundation.

As a preliminary matter, the parties dispute whether, and if so to what extent, we should defer to the commission's resolution of this legal issue. The Hogans argue that the commission's decision is entitled to "controlling weight" because it involves the construction and interpretation of its own rules. *See Pfeiffer v. Board of Regents*, 110 Wis.2d 146, 154-55, 328 N.W.2d 279, 283 (1983) (agency's interpretation of its own regulations entitled to controlling weight unless inconsistent with the language of the regulation or clearly erroneous). The *Pfeiffer* rule is based on the following rationale:

> An administrative agency knows the specific purposes of the regulations it has promulgated. Moreover, an agency has a certain experties in the area it is called upon to regulate. Thus we believe that an agency is in the best position to interpret its own regulations in accordance with their underlying purposes. For this reason, in construing such regulations, we ordinarily defer to the adopting agency's interpretation.

Id. at 155, 328 N.W.2d at 283.

The commission's decision, however, is much more than a simple interpretation of one of its procedural rules. The jump from an administrative rule stating that the commission will "substantially follow" circuit court procedures to a decision that the rule permits the commission to entertain class-action refund claims—in the face of other statutes and rules which, as we discuss below, suggest quite the contrary—is, in our view, inconsistent with the principles underlying the *Pfeiffer* rule.

Nor does it appear from the record that the commission has considered or ruled in the past that, in light of the statutes governing tax refund proceedings before the com-

mission and the department, it has the authority to either certify a class or permit counsel for an individual refund claimant to file or prosecute a class refund claim in an appeal from a ruling of the department. Indeed, as the department points out, the fact that the commission, acting *sua sponte*, issued, then modified, then modified yet again, its decision on the class certification, changing its rationale each time, suggests that the question was indeed one of first impression before the agency.[13]

We said in *Amsoil, Inc. v. LIRC*, 173 Wis.2d 154, 165, 496 N.W.2d 150, 154 (Ct. App. 1992), that, while we will generally pay some deference to an administrative agency's construction of a statute where the agency has "special expertise and experience" in interpreting the statute, we will not do so when the agency decision involves "novel questions of statutory interpretation that the agency has not previously addressed . . . ." That is so because judicial deference to an administrative decision is based on the agency's "uniform interpretation [of the statute] over a period of time." *Id.* It is also true, of course, that an agency's decision dealing with the interpretation and scope of its own powers is not binding on the courts. *Id.* We conclude that the commission's ruling in this case is reviewable de novo on this appeal.[14]

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[13] The department has also referred us to two earlier decisions where the commission refused to permit the pursuit of relief by the taxpayer on behalf of anyone but the taxpayer him- or herself. *See Stege v. DOR*, Docket No. PTR-6740, 11 WTAC 81, Wis. Tax Rep. (CCH) ¶ 201-729 (Sept. 16, 1980); *Morrissey v. DOR*, Docket No. I-8189 (Apr. 1, 1981).

[14] The Hogans contend that our review need not go further than *Hogan v. Musolf*, 163 Wis.2d 1, 471 N.W.2d 216 (1991), *cert. denied*, 502 U.S. 1030 (1992), which they suggest establishes the validity of the class as a matter of law. We disagree. *Hogan* was a 42 U.S.C. § 1983 class action filed by the Hogans in circuit court raising, among others, the same arguments they are advancing here. The primary issue in *Hogan* was whether the plaintiffs had to exhaust their administrative remedies before pursuing relief in

Claims for tax refunds are governed by § 71.75, STATS. Indeed, § 71.75(1) states that, with certain exceptions not relevant here, "the provisions for refunds and credits provided in this section shall be *the only method* for the filing and review of claims for refund of income [taxes]" and that "no person may bring any action or proceeding for the recovery of such taxes other than as provided in this section." (Emphasis added.)

The income tax refund process involves both the department of revenue and the tax appeals commission. The process begins in the department which, under the law, is the agency exercising "general supervision over the administration of the . . . tax laws of the state." Section 73.03(1), STATS. The commission, on the other hand, exercises primarily appellate authority. A taxpayer aggrieved by the department's denial of a claim for a tax refund "may appeal to the tax appeals commission," § 71.88(1) and (2), STATS., and the commission is authorized to hear and decide the cases so appealed as "the final authority for the hearing and determination of all questions of law and fact" with respect to the issues properly brought before it. Section 73.01(4)(a) and (e), STATS.

The commission's class-action rulings in this case contravene two specific and plainly worded statutes. The first

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circuit court under § 1983. An ancillary issue had to do with intergovernmental immunity claims under 4 U.S.C. § 111, which preserves federal employees' immunity from discriminatory state taxation.

The Hogans base their argument on the supreme court's statement in the opinion that the action must be dismissed because "[t]he plaintiffs have a plain, adequate and complete [administrative] remedy" which must be pursued before coming to court under § 1983. *Hogan*, 163 Wis.2d at 27, 471 N.W.2d at 226. On its face, however, the statement does not bear in any way upon the tax appeals commission's authority to certify a class and entertain a class refund proceeding. The issue was not before the court in any guise, and the Hogans' argument on the point is unavailing.

is § 71.75, STATS., which sets forth the requirements for filing and processing refund claims before the department. Section 71.75(6) mandates that "[e]very claim for refund" must be filed with the department "in the manner, and on a form . . . signed by the person . . . who filed the return on which the claim is based." By permitting the Hogans to change their appeal from one based on their individual returns to one representing a class of more than 25,000 other taxpayers, many of whom have never filed their own claims with the department, would effectively nullify the provisions of § 71.75(6) as to those taxpayers.

Second, the statutes dealing with the commission's appellate jurisdiction expressly state that, in order to prosecute an appeal from the department's assessment of a tax, the taxpayer must, among other things, testify under oath before the commission as to his or her actual income. Section 71.89(2), STATS. This provision, too, would be nullified if the commission could add thousands of "absent" parties to the proceeding by permitting the Hogans' individual appeal to proceed as a class action.

Few principles of law are as well established as the proposition that administrative agencies, as entities created by the legislature as part of the executive branch of government, have only such powers as are expressly granted to them by the legislature, or as may be necessarily implied from the applicable statutes. *The Avenue, Inc. v. La Follette,* 183 Wis.2d 409, 415, 515 N.W.2d 339, 342 (Ct. App. 1994). In determining the nature and scope of an agency's powers, its enabling statutes are to be "strictly construed to preclude the exercise of a power not expressly granted," and "[a]ny reasonable doubt as to the existence of an implied power should be resolved against [the agency]." *State Public Intervenor v. DNR,* 177 Wis.2d 666, 671, 503 N.W.2d 305, 308 (Ct. App. 1993), *rev'd on other grounds,* 184 Wis.2d 407, 515 N.W.2d 897 (1994) (citation omitted).

However broad its appellate jurisdiction, the statute authorizing the commission to establish its own "rules of practice and procedure" cannot, in our opinion, be reasonably construed to empower the commission to permit an individual taxpayer, in an appeal from an adverse ruling of the department on his or her individual refund claim, to undertake to represent a class of thousands of other taxpayers in the appeal proceedings. For the commission to do so would contravene—if not nullify—the plainly worded and mandatory statutes prescribing refund procedures before both the department and the commission itself, for it would permit the addition of thousands of parties and claims never processed before the department as required by § 71.75(1) and (6), STATS., and would effectively nullify the personal-appearance requirements of 71.89(2), STATS., dealing with procedure before the commission. We do not see the commission's statutory powers as permitting it to add so greatly to its own jurisdiction—much less to negate statutes and rules governing procedures before another agency.

Undoubtedly, a class-action procedure before the commission—at least in extraordinary cases such as this one—would greatly benefit the taxpayers by relieving them from making individual application for the refunds. Because, under well-established principles of law, we cannot expand the commission's authority beyond that granted by the legislature, any such relief will have to come from that body. Accordingly, we remand to the circuit court with directions to enter an order reversing the summary judgment issued by the tax appeals commission on May 27, 1993.

By the Court.—Judgment reversed and cause remanded with directions.

Recommended for publication in the official reports.

GARTZKE, P.J., (*concurring*). We have held that the Hogans and their fellow plaintiffs have failed in their effort to pursue the class action route. We have reached the correct but perhaps an unjust result. Our decision means that federal retirees whose federal pensions have been unconstitutionally taxed by Wisconsin must individually seek refunds under § 71.75, STATS. Section 71.75(2) provides in pertinent part, "With respect to income taxes . . ., refunds may be made if the claim therefor is filed within 4 years of the extended date under this section on which the tax return was due."

The Hogans tell us that when this proceeding commenced in April 1989 over 20,000 retired civilian employees of the federal government and survival annuitants of such deceased retirees, and 5,000 military retirees were subjected to Wisconsin's unlawful tax. The Hogans assert members of the class also made additional filings with the department of justice, the legislature, the department of revenue and the claims board to supplement, amend and perfect the class members' entitlement to full relief.

Moreover, we are told that many class members are elderly citizens who live on fixed incomes and have limited financial resources, several have been legally incompetent since this case began and others are physically incapable of indicating their rights. We are told that many class members died during the first year of this proceeding and the rate of death is increasing dramatically. We are told that many class members, due to their age and circumstances, require assistance to perfect their claims but cannot afford to pay the cost of preparing an amended return. In other cases, the cost of preparing an amended return equals or exceeds the refund due.

Our decision may thus result in persons otherwise entitled to refunds losing their rights because they have relied on this class action and it is too late, expensive or inconvenient for them to file individual claims for a re-

fund. That result is unjust. Persons whose property has effectively been taken by an unlawful tax should not be penalized because they relied on what seemed a reasonable attempt to obtain their refunds through a class action. If they will be penalized, then the legislature should consider protecting those persons by extending the time to file their claims for refunds and perhaps directing the department of revenue to assist them in processing their claims.

I am authorized to state that Judges Eich and Vergeront join this concurring opinion.

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT
BRANCH 3
DANE COUNTY

Case Nos. 93-CV-2532 through 93-CV-2539
93-CV-2549, 93-CV-2978

WISCONSIN DEPARTMENT OF REVENUE,
Petitioner,

v.

J. GERARD HOGAN, DOLORES M. HOGAN on behalf of themselves and all residents of the State of Wisconsin who were paid retirement benefits by the United States Government in any one or all of the years 1984, 1985, 1986, 1987 and 1988, similarly situated,
Respondents.

JUDGMENT

This consolidated proceedings, having come before the Honorable P. Charles Jones, upon petitioner's Petitions for Review; and the petitioner having appeared by Attorney General James E. Doyle and Assistant Attorney General F. Thomas Creeron; and the respondents having appeared by Eugene O. Duffy and Gregory W. Lyons; and the Court having decided the matter upon briefs, papers and the entire file herein;

IT IS ORDERED AND ADJUDGED that this consolidated proceeding is DISMISSED and this matter is

REMANDED to the Commission to implement and finalize its decision herein, including the question of attorneys' fees and costs to counsel for respondents.

Dated this 10 day of Jan., 1995.

BY THE COURT:

/s/ P. Charles Jones
HONORABLE P. CHARLES JONES
Circuit Court Judge, Branch 3

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT
BRANCH 3
DANE COUNTY

Case Nos. 93-CV-2532 through 93-CV-2539
93-CV-2549, 93-CV-2978

WISCONSIN DEPARTMENT OF REVENUE,
Petitioner,

VS.

J. GERARD and DELORES M. HOGAN, *et al.*,
Respondents.

MEMORANDUM DECISION AND ORDER

This court's Memorandum Decision dismissing these administrative reviews and remanding to the Tax Appeals Commission to implement and finalize its summary judgment decision was issued November 12, 1994. On November 16, 1994, Petitioner (WDOR) filed a Motion For Correction and Clarification. The motion seeks to have the court correct "those portions of pages six through eleven of the court's memorandum decision and order which mistakenly assume that the Department did not file timely petitions for judicial review within thirty days of Commissioner Timken's May 27, 1993, decisions and orders granting summary judgment." The motion also seeks "clarification of the status of its timely petitions for judicial review of the Commissions' (sic) May 27, 1993 decisions and orders insofar as those petitions relate to items other than the Commission's constitutional

or statutory authority or jurisdiction to grant class certification." Support for the motion appears to follow the motion.

On November 23, 1994, class counsel filed a brief in opposition to the motion. WDOR did not responded to the brief.

I erroneously assumed that the Department's motion for rehearing sought under § 227.49 following Commissioner Timken's oral decision granting summary judgment and its petition for review following denial of the petition for rehearing was the Department's response to the oral decision. Apparently, the Department both filed for rehearing and petitioned for judicial review from the oral decision.[1] It also petitioned for review from the order denying rehearing. To the extent the memorandum decision was in error, it is corrected as requested in the motion.

WDOR seeks to clarify the status of other objections to the class certification it claims it preserved in the Partial Settlement Agreement.[2] I specifically refused to pass upon the reasonableness of the Partial Settlement Agree-

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[1] The relevant statutory procedures do not contemplate that both procedures will be taken simultaneously. § 78.01(4)(dn) provides for oral notice of "appeal rights"; § 227.49 provides for a petition for rehearing within 20 days of the final order and § 227.53(1)(a)2 contemplates that petitions for review will occur within 30 days "after service of the of the order finally disposing of the application for rehearing . . ."

[2] As quoted by WDOR, the Partial Settlement Agreement apparently provides:

> . . . in any way to sovereign immunity; to the filing, timeliness, validity, jurisdictional, legal basis or authority for claims other than individual refund claims; to the jurisdiction, authority, validity, legal basis for, or exercise of discretion by the Commission (or the satisfaction of the standards bearing on the grant of summary judgment) as to class action procedure, class certification, class definition; or to the payment of attorneys fees to counsel for respondents.

ment in part because I did not want to assume jurisdiction over the subject matter of the class or the objections to the class certification in light of the objection to jurisdiction being raised by the class. Therefore, I remanded that issue to the Commission.

In the memorandum decision I found that this court lacked competency or subject matter jurisdiction to consider the class certification issue because of the untimeliness of the petition for review. Parties cannot confer subject matter jurisdiction by consent.

I find no reason to clarify my memorandum decision.

Therefore, It Is Ordered that the memorandum decision is corrected as requested in WDOR's motion, but clarification of the decision is DENIED.

Dated: December 14, 1994

BY THE COURT:

/s/ P. Charles Jones
P. CHARLES JONES
Circuit Judge

APPENDIX E

STATE OF WISCONSIN
CIRCUIT COURT
BRANCH 3
DANE COUNTY

Case Nos. 93-CV-2532 through 93-CV-2539
93-CV-2549, 93-CV-2978

WISCONSIN DEPARTMENT OF REVENUE,
Petitioner,

vs.

J. GERARD and DELORES M. HOGAN, *et al.*,
Respondents.

MEMORANDUM DECISION AND ORDER

Finally, the tortured and troubling journey of this case has reached the homestretch.[1] After years of litigation in the circuit and appellate courts of Wisconsin, [cert. denied, —— U.S. ——, 112 S.Ct. 867 (1992)], and the Tax Appeals Commission, the Department of Revenue, ("WDOR"), seeks review of the one remaining issue in this litigation. This issue is whether the Tax Appeals Commission, ("Commission"), had the authority to cer-

[1] This controversy began in this court as a 42 U.S.C. § 1983 action on April 17, 1989. ("Hogan I"). After assuming jurisdiction, certifying the class represented by plaintiffs-Hogan and Poker, and granting limited preliminary injunctive relief, the defendants appealed. The Court of Appeals affirmed this court, 157 Wis.2d 362 (Ct. App. 1990), the Supreme Court reversed, 163 Wis.2d 1 (1992). After certiorari was denied by the U.S. Supreme Court, 112 S.Ct. 867 (1992), the controversy moved to the Tax Appeals Commission where the Commission certified the class and on May 27, 1993, granted summary judgment to the class.

tify a class of resident taxpayers of the State of Wisconsin who paid the unconstitutionally imposed tax on certain federal employees' retirement benefits. ("the class"). The Commission certified the class as provided by § 803.08, Stats., of the Rules of Civil Procedure adopted by the Commission. The Commission granted summary judgment to the class on May 27, 1993, (rehearing denied on June 29, 1993), and ordered tax refunds to the class.

WDOR petitioned for review in ten separate dockets. After the cases were filed in Dane County Circuit Court, the parties to Docket No. 91-I-386, (the original Hogan case), entered into a Partial Settlement calling for consolidation of the ten dockets in this court and providing for staggered refunds of taxes for applicable tax years to all Wisconsin taxpayers who had timely filed claims for tax refunds for taxes collected on their federal retirement benefits. The Partial Settlement was approved by the Commission following limited remand from this court.[2] The Partial Settlement narrowed the issues in this case to one remaining issue: whether additional taxpayers included in the class certified by the Commission but not covered by the Partial Settlement are also entitled to refunds.

As a result of the Partial Settlement which narrowed this review to the single legal issue noted above, the history of this litigation need not be recited in detail. Rather, the relevant facts surrounding the actions of the Commission in certifying the class and granting summary judgment to the certified class will be noted in the body of the decision.

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[2] I remanded the question of the reasonableness of the Partial Settlement back to the Commission. I did so, in part, because of the subject matter jurisdiction issue being raised in this review proceeding. In light of the jurisdictional issue, I was concerned that if this court passed judgment on the reasonableness of the Partial Settlement it might assume jurisdiction over the merits of the case.

After fully considering the record in this matter, I conclude that WDOR untimely filed this petition for review. Therefore, this court lacks subject matter jurisdiction or competency to consider the remaining issue. I, therefore, dismiss WDOR's petition as untimely and remand the matter to the Commission for further proceedings implementing and finalizing its summary judgment, including the issue of determination of appropriate attorney fees and costs to class counsel.

TIMELINESS OF JUDICIAL REVIEW

1. Class Certification. Judicial review of administrative agency decisions is dictated by statutory procedures. Review under Ch. 227 requires that a petition be served and filed according to the requirements of § 227.52 and § 227.53, Stats. Reviewable decisions under § 227.52 are:

> Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form . . .

Under § 227.53, a person aggrieved by a decision under § 227.52 must serve and file the petition for review "within 30 days after service of the decision of the agency . . . [or] if a rehearing is requested under s. 227.49, . . . within 30 days after service of the order finally disposing of the application for rehearing, . . ." § 227.53(1)(a)2.

Class certification came before the Commission on motion of the Hogans. In response, WDOR moved the Commission to deny class certification. On October 28, 1992, in a written decision containing findings of fact and conclusions of law, the Commission certified the class.[3]

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[3] § 227.47 provides that:

> Every proposed or final decision of an agency or hearing examiner following a hearing and every final decision of an

On November 17, 1992, pursuant to § 227.49, WDOR petitioned for rehearing of the Commission's decision that it had the authority to certify a class. § 227.49(1) provides:

> . . . Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities.

On February 16, 1993, the Commission, in a 38 page written decision, affirmed its decision certifying the class in a "Ruling and Order on Motion for Rehearing." This decision was followed by an "Order for Class Certification" dated February 23, 1993. Neither the Ruling and Order on Motion for Rehearing or the Order for Class Certification were appealed within 30 days as required by § 227.53(1)(a)2.[4] Failure to seek timely review of appealable decisions denies the circuit court subject matter jurisdiction or competency to review the Commission's decision. *YMCA of Beloit v. Department of Revenue*, 141 Wis.2d 907, 912 (Ct. App. 1987); *Fox v. DHSS*, 112 Wis.2d 514, 538 (1983).

Certification of the class by the Commission in this case was a decision which "adversely affect[ed] the substantial interests of . . . person[s]." § 227.52, Stats. It determined the make-up of the parties subject to the jurisdiction of the Commission involved in the underlying litigation. The decision "directly affect[ed] the legal rights, duties or privileges" of these persons. *Pasch v.*

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agency shall be in writing accompanied by findings of fact and conclusions of law.

[4] § 227.53(1)(a)2 provides in relevant part:

If a rehearing is requested under § 227.49, any party desiring judicial review shall . . . file a petition for review within 30 days after the service of the order finally disposing of the application.

Wisconsin Dep't of Revenue, 58 Wis.2d 346, 356 (1973). It impacted both on the WDOR and on the persons certified as members of the class. Although WDOR maintained in both its motion objecting to the class certification and its petition for rehearing that the Commission lacked the legal authority to certify a class, the Commission decided this legal issue adversely to WDOR. This issue was at the heart of the legal controversy before the Commission.

2. *Appealability.* WDOR maintains that neither the Commission's decision of October 28, 1992, nor its affirmance on February 16, 1993, (and, presumably, the Commission's Order for Class Certification), were subject to review under § 227.52 and § 227.53 because class certification was not a "final" decision. I disagree.

Although normally class certification under § 803.08 is a discretionary determination, *Sisters of St. Mary v. AAER Insulation,* 151 Wis.2d 708 (Ct. App. 1989), because WDOR maintained throughout this proceeding that the Commission lacked the legal authority to certify a class, it raised a question of law wholly independent of the discretionary authority to certify a class under § 803.08. *Ledger v. City of Waupaca Bd. of Appeals,* 146 Wis.2d 256, 262 (Ct. App. 1988). Thus, the Commission's decision certifying a class was a final decision appealable under § 227.53(1)(a)2.

WDOR considered the October 28, 1992, decision a final decision sufficient to authorize a petition for rehearing under the requirements of § 227.49(1). ("Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for relief sought and supporting authorities.") In fact, WDOR considered the October 28, 1992, decision "final" on the issue of prospectivity.

Apparently, WDOR assumes that it can seek rehearing from any decision of the Commission whether final or not

and, if the petition is honored by the Commission, get a "second kick at the cat". This cavalier suggestion is disingenuous and contrary to the clear language of § 227.49, the statute under which rehearing was sought by WDOR.

WDOR argues that the class certification decision is merely a procedural finding and, therefore, only subject to interlocutory review. In support it cites, *obtusely*, 59 Am. Jur. 2d *Parties* § 81 (1987); *State ex rel. G.E. Co. v. ILHR Department*, 68 Wis.2d 688, 694 (1975); and *Pasch*, 58 Wis.2d at 354.[5] In fact, the *Pasch* court, cited by WDOR, establishes that WDOR's argument is misplaced:

> However, neither the form of the order nor the label of "final" or "interlocutory" necessarily determines its character as to reviewability. . . .
>
> An order that directly affects the legal rights, duties or privileges of a person is appealable pursuant to secs. 227.15 and 227.16, Stats. [now secs. 227.52 and 227.53], whether such order is denominated "final" or "interlocutory." In *Neu's Supply Line v. Department of Taxation* (citation omitted) this court recognized the futility of strict adherence to the labels "final" and "interlocutory," in the determination of whether a particular administrative decision is reviewable.

It is my opinion that WDOR was required under the statutory procedure set out in Ch. 227 to seek review of the Commission's October 28, 1992, decision certifying the class, or, having filed for rehearing pursuant to

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[5] WDOR also cites to 15B Wright, Miller & Cooper, *Federal Practice & Procedure*, § 3914.19 at 63 (1992) for the proposition that "[o]rders granting certification are no more final than orders denying certification." This is a curious citation in light of WDOR's position that the Commission lacks authority to certify a class under any circumstance.

§ 227.49, to seek review of the Commission's February 16, 1993, decision affirming certification of the class. WDOR had 30 days to file the petition, and, having failed to do so, this court lacks subject matter jurisdiction or competency to consider the untimely filed petitions.[6]

SUMMARY JUDGMENT DECISION

1. Petition for Rehearing. Even accepting, *arguendo*, WDOR's position that the certification of the class was not a final decision subject to review and, therefore, the Commission's October, 1992, and February, 1993, class certification decisions were only subject to interlocutory review, WDOR again failed to follow statutory procedure to properly seek judicial review of the Commission's summary judgment decision in May, 1993, granting judgment to the class.

Commissioner Timken's May, 1993, "oral decision" granting summary judgment was rendered pursuant to § 73.01(4)(dn).[7] It was delivered as a one commissioner oral decision with the specific consent of the parties as required by this statutory provision.[8] It was given in this

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[6] If WDOR viewed the February 23, 1993, Order for Class Certification as the "order finally disposing of the application for rehearing", WDOR had 30 days from that order to petition for review. It failed to do so.

[7] § 73.01(4)(dn) provides in relevant part:

> In connection with the hearing of any matter required to be heard and decided by the commission, . . . the chairperson or any member of the commission assigned to hear the matter may, with the consent of the parties, render an oral decision. . . . Oral decisions constitute notice for purposes of determining the time in which appeals may be taken. Provisions of this section or ch. 227 in conflict with this paragraph do not apply to decisions rendered under this paragraph.

[8] At this point, the then 3 member Tax Appeals Commission was down to only one remaining commissioner because Commissioner Musolf recused himself at the beginning of the case because he was a former secretary of the WDOR and a named defendant

manner for a singular purpose as explained by Commissioner Timken in his decision:

> I have served on the Wisconsin Tax Appeals Commission since 1969 under six governors and have never encountered a procedural problem such as this. Some people might call it bizarre. Clearly, it would be a sad miscarriage of justice to have this matter trapped at this stage, the second rung of a six-rung appeal ladder.
>
> After carefully examining the chapter of the Wisconsin Statutes that govern our operation, which is Chapter 73, I became convinced that there was only one clear and unambiguous way I could decide this case by myself.
>
> Section 73.01(4)(dn) of the Wisconsin Statutes provides, and I quote, "In connection with the hearing of any matter required to be heard and decided by the commission,—the chairperson or any member of the commission assigned to hear the matter may, with the consent of the parties,"—and only with the consent of the parties—"render an oral decision."

As an oral decision, it constituted its own notice of appeal rights. ("Oral decisions constitute notice for purposes of determining the time in which appeals may be taken.")

§ 73.01(4)(e) provides, in relevant part, that "[t]he decision or order of the Commission shall become final and shall be binding upon the petitioner and upon the department of revenue for that cause unless an appeal is taken from the decision or order of the Commission under § 73.015." § 73.015 provides in relevant part that "[a]ny adverse determination of the tax appeals commission is subject to review in the manner provided in Ch. 227." Reading these sections together, in harmony, they provide

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in Hogan I, and Commissioner Bartley recused himself on April 8, 1998.

that: (1) an oral decision rendered under § 73.01(4)(dn) is a final decision subject to appeal. It is not subject to a petition for rehearing. (2) Unless timely appealed under § 73.015, the oral decision becomes final pursuant to § 73.01(4)(e). (3) § 73.015 incorporates the 30 day time for appeal provided for in Ch. 227 pursuant to § 227.53(1)(a).

Without dispute, WDOR did not seek review of Commissioner Timken's oral decision within 30 days as required by § 73.015. Instead, WDOR once again petitioned for rehearing under § 227.49. A petition for rehearing is a procedure not authorized by the statutes under which Commissioner Timken's oral decision was rendered.[9]

Even if a petition for rehearing were authorized, this petition would constitute a second petition for rehearing of the same contested case under § 227.49. § 227.49 provides in part that "[n]o agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case." WDOR sought two rehearings on the certification question under this statutory provision: it petitioned for rehearing following the Commission's October 28, 1992, decision certifying the class, and it petitioned for rehearing following Commissioner Timken's oral decision granting summary judgment to the class. In both petitions, the issue being raised by WDOR was the Commission's authority to certify a class. The petition for rehearing denied by Commisioner Timken under § 227.49(3) was a second attempt to be reheard on the certification issue and was without express authority.

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[9] There is no "service" of the oral decision as required by § 227.49 to trigger the petition for rehearing. Therefore, § 73.01 (4) (dn) provides oral notice of appeal rights and "[p]rovisions of this section or ch. 227 in conflict with this paragraph do not apply to decisions rendered under this paragraph."

WDOR did not seek review of Commissioner Timken's summary judgment decision within 30 days. Therefore, even agreeing, for purposes of argument, that the only final, reviewable decision on class certification was Commissioner Timken's oral decision granting summary judgment to the class, WDOR failed to file a timely petition for review of that decision. Once again WDOR failed to comply with the statutory procedure for timely review of the class certification question.

2. *Notice of Rights.* In a final argument, WDOR maintains that irrespective of the finality of the certification decisions and the time limits for review, § 227.48 saves them and permits this petition for review. § 227.48 provides in part that:

> Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, . . . No time period specified under s. 227.49(1) for filing a petition for rehearing [or] under s. 227.53(1)(a) for filing a petition for judicial review . . . begins to run until the agency has complied with this subsection.

WDOR argues that the Commission's February, 1993, decision affirming the decision certifying the class did not require a petition for review within 30 days under § 227.53(1)(a) because no notice of review rights under § 227.48 was attached to the decision. It also argues that even though Commisioner Timken erroneously and probably inadvertently provided notice of review rights under § 227.48 in his denial of WDOR's "outlaw" petition for rehearing following his oral decision of the May, 1993, this unauthorized notice of rights established review rights which WDOR could utilize.

This exercise in procedural gymnastics fails on both fronts: first, WDOR petitioned for rehearing following the Commission's October 28, 1992 decision, and it did so pursuant to § 227.49. The Commission granted the

petition and issued a 38 page decision affirming its earlier action. Therefore, WDOR knew, with or without notice under § 227.48, that the decision was a final decision under § 227.53(1)(a). Second, WDOR's petition for review following Commissioner Timken's denial of its "outlaw" petition for rehearing was not timely. As noted above, § 73.01(4)(dn) provides that the oral decision is "notice" of appeal rights and anything in § 227.48 to the contrary "in conflict do[es] not apply" *Id.*

CONCLUSION

WDOR had two and perhaps three opportunities to timely seek review of the Commission's decision certifying the class of taxpayers: first, it could have sought review of the Commission's decision of October 28, 1992, holding that it had the authority to certify a class. WDOR did not seek review within 30 days under § 227.53(1)(a); rather, it sought rehearing under § 227.49. Second, WDOR could have sought review of the Commission's decision of February 16, 1993, affirming on rehearing its earlier decision certifying the class; rather, it did nothing. Third, WDOR might have tried to seek review of the Commission's Order Certifying Class dated February 23, 1993, arguing that this was the "order finally disposing of the application for rehearing" under § 227.53 (1)(a)2; it did not.

Even accepting WDOR's arguments why it did not seek review of these decisions, WDOR did not timely seek review of Commissioner Timken's oral decision granting summary judgment to the class dated May 23, 1993. Instead of appealing within 30 days, it filed a petition for rehearing, an "outlaw" pleading not authorized by the applicable statutes.

In either case, WDOR failed to timely seek review of the Commission's certification decision, and its failure

deprives this court of subject matter jurisdiction or competency to proceed.[10]

Therefore, this consolidated proceeding is DISMISSED and the matter is REMANDED to the Commission to implement and finalize its decision, including the question of attorney fees and costs to class counsel. Class counsel may prepare a final order for my signature.

Dated: November 12, 1994

BY THE COURT:

/s/ P. Charles Jones
P. CHARLES JONES
Circuit Judge

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[10] In writing this decision, I considered, in the alternative, affirming the Commission's decision on the merits, but concluded that an alternative disposition would serve no useful purpose. If this decision is appealed and should this decision finding WDOR's appeal untimely be reversed, the appellate court should proceed to review the merits of the Commission's decision certifying the class. Remand for this court to consider the merits would be an unnecessary step in the review process because, ultimately, the appellate court must review the underlying agency's action *de novo* and without deference to the circuit's court's decision. *Hazelton v. State Personnel Comm'n*, 178 Wis.2d 776, 785 (Ct. App. 1993).

APPENDIX F

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Docket No. 91-I-386

J. GERARD AND DELORES M. HOGAN, *et al.*,
c/o Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.
111 E. Wisconsin Avenue, Suite 1400
Milwaukee, WI 53202-4803
Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708
Respondent.

ORDER

The respondent, Wisconsin Department of Revenue, filed with this Commission on June 16, 1993 a petition for rehearing of the Commission's ORAL ORDER GRANTING PETITIONERS' CLASS MOTION FOR SUMMARY JUDGMENT rendered on May 27, 1993.

After careful consideration, this Commission, by Thomas R. Timkin, the only Commissioner empowered to hear and decide this matter, voted to deny the petition. The Commission found that the respondent had shown no material error of law or fact nor the discovery of new evidence sufficiently strong to reverse or modify its decision and which could not have been previously discovered by due diligence. Sec. 227.49(3), Stats.

Therefore,

IT IS ORDERED

That the respondent's petition for rehearing in the above-entitled matter is hereby denied.

Dated at Madison, Wisconsin, this 29th day of June, 1993.

WISCONSIN TAX APPEALS COMMISSION

/s/ Thomas R. Timken
THOMAS R. TIMKEN
Presiding Commissioner

pc: Petitioners
Representative
Respondent

ATTACHMENT: "NOTICE OF APPEAL INFORMATION"

WISCONSIN TAX APPEALS COMMISSION

NOTICE OF APPEAL INFORMATION

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's decision rendered:

Any party has a right to petition for a rehearing of this decision within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences the day after personal service or mailing of this decision. (Decisions of the Tax Appeals Commission are mailed the day they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for rehearing should be filed with the Wisconsin Tax Appeals Commission. Nevertheless, an appeal can be taken directly to circuit court through a petition for judicial review. It is not necessary to petition for a rehearing.

Any party has a right to petition for a judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes. The petition must be filed in circuit court and served upon the Wisconsin Tax Appeals Commission and the Department of Revenue within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of law of any petition for rehearing. (Decisions of the Tax Appeals Commission are mailed the day

they are dated. In the case of an oral decision, personal service is the oral pronouncement of the decision at the hearing.) The petition for judicial review should name the Department of Revenue as respondent.

This notice is part of the decision and incorporated therein.

APPENDIX G

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Docket No. 91-I-386

J. GERARD AND DOLORES M. HOGAN, *et al.*,
Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

ORAL DECISION HEARING: 10:00 a.m., May 27, 1993, in the Hearing Room of the Wisconsin Tax Appeals Commission, 6th Floor, 101 East Wilson Street, Madison, Wisconsin.

PRESIDING: Commissioner Thomas R. Timken.

APPEARANCES: The petitioners appeared by Attorneys Eugene O. Duffy and Gregory W. Lyons, of O'Neil, Cannon & Hollman, S.C.; the respondent appeared by Attorney Kevin B. Cronin.

COMMISSIONER TIMKEN: On the record. We'll call for hearing in the matter of J. Gerard Hogan, Dolores M. Hogan, and others, petitioners, versus the Wisconsin Department of Revenue, respondent, Docket No. 91-I-386.

Would you give the appearances for the record, please?

MR. DUFFY: For the petitioners, Commissioner, Eugene Duffy and Greg Lyons.

MR. CRONIN: The Department of Revenue appears this [2] morning represented by Kevin Cronin.

COMMISSIONER TIMKEN: Thank you, gentlemen.

My name, for the record, is Thomas R. Timken. I am the Commissioner that's going to preside and decide this case today.

As you all know, we're here today to rule on the petitioners' motion for summary judgment, but first I want to read into the record the background of what is a very unusual case.

Starting with, on September 24, 1991, this appeal was filed with this Tax Appeals Commission after considerable litigation in the courts, which I won't go into. Suffice it to say that this pot has now been brewing for four years.

At the time it was filed with us, this was a five-member Commission, with all decisions other than small claims and several other minor variances requiring a quorum of three members. Because he was a defendant in the case, the Chairperson of the Commission, Mark Musolf, immediately recused himself, leaving four members eligible to participate.

Effective July 1, 1992, by legislation, this commission was reduced to three members. That left two of us to consider this case, still the necessary quorum, Douglas Bartley and myself. While Commissioner Bartley was the lead, I was completely informed and involved, and after careful deliberation I joined in all major decisions, including prospectivity and class certification, which will not here be revisited.

[3] On April 8, 1993, Commissioner Bartley, for reasons well known to all of us, recused himself. That left only myself to finalize this very important case, and one does not a quorum make.

I have served on the Wisconsin Tax Appeals Commission since 1969 under six governors and have never encountered a procedural problem such as this. Some people might call it bizarre. Clearly, it would be a sad

miscarriage of justice to have this matter trapped at this stage, the second rung of a six-rung appeal ladder.

After carefully examining the chapter of the Wisconsin Statutes that govern our operation, which is Chapter 73, I became convinced that there was only one clear and unambiguous way I could decide this case by myself.

Section 73.01(4)(dn) of the Wisconsin Statutes provides, and I quote, "In connection with the hearing of any matter required to be heard and decided by the commission, . . . the chairperson or any member of the commission assigned to hear the matter may, with the consent of the parties,"—and only with the consent of the parties—"render an oral decision."

On May 4, 1993, the petitioner filed a written consent. On May 6, 1993, the respondent filed a written consent. And I thank both parties for allowing me to continue in this way.

I am now prepared to render an oral decision pursuant to the provisions of Section 73.01(4)(dn) of the Wisconsin [4] Statutes. Before doing so, however, I would like to state for the record that no one—no one—in or out of state government has exerted any pressure of any kind in an effort to influence my decision in this matter. That decision is based solely on my conscience and my understanding of the controlling law and on that only.

Now as to the remedy sought by the petitioners, summary judgment. A little background on that.

On November 19, 1992, the petitioner filed with this commission a summary judgment motion pursuant to Section 802.08 of the Wisconsin Statutes and Rules TA 1.31(1) and 1.39 of the Wisconsin Administrative Code.

Section 802.08(2) provides in part—and once again I quote—"The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." That's a direct quote.

Both parties agree that there is no genuine issue as to any materials facts, and indeed there is not.

Summary judgment is the appropriate remedy, and this case is ripe for decision on that basis.

Let me now briefly summarize what I consider to be the controlling facts.

[5] During the years 1984 through 1988, the State of Wisconsin imposed and collected an income tax on pensions received from individuals who had worked for and subsequently retired from the federal government.

During the same years, the pensions received from individuals who had worked for and subsequently retired from selected state and local governments as of December 31, 1963 were exempt from the same Wisconsin income tax.

The Wisconsin Retirement systems involved were: Wisconsin State Teachers Retirement System; Milwaukee County Employees Retirement System; Sheriff's Annuity and Benefit Fund of Milwaukee County; City of Milwaukee Employees Retirement System; City of Milwaukee Police Officers Annuity and Benefit Fund; City of Milwaukee Firefighters Annuity and Benefit Fund; and Public Employe Trust Fund as successor to the Milwaukee Public School Teachers Annuity and Retirement Fund.

No other state of Wisconsin pensioners enjoyed this exemption.

The federal pensioners—the class we are dealing with today—believe that they have been unlawfully discriminated against and are claiming a refund of income taxes they have paid to the States of Wisconsin in the years 1984 through 1988.

The respondent, Wisconsin Department of Revenue, has denied their claim.

There is no dispute that the members of the class, [6] including the Hogans, paid the taxes in question in each of the years or as to the actual dollar amount of their respective claims.

That now brings us to the law involved. First, its historical background.

Prior to 1939, prevailing law held that the states were precluded from taxing the compensation, both current and deferred, of those who worked for the federal government.

Simultaneous with Congress' enactment of the Public Salary Tax Act of 1939—now codified as 4 United States Code 111—the Wisconsin Legislature enacted Chapter 293, Laws of Wisconsin 1939, which paralleled the provisions of the federal law. The gist of both of these laws was to allow Wisconsin to tax income received from federal employees as long as there was no discrimination as to the source of that income.

Both of these federal and state laws were in effect during the entire period we are dealing with here today.

The exemption for federal retirees continued until the mid 1960's, when the Wisconsin Legislature repealed it. The exemption for the state retirees referred to earlier continued in full force and effect.

This was the birth of the problem we are now faced with today, and it has fermented until 1989.

Then the bombshell.

On March 28, 1989, the United States Supreme Court held [7] that the Michigan income tax provisions according preferential treatment to state and local employee retirement income was in violation of principles of intergovernmental tax immunity as codified in 4 United States Code 111, in the landmark case of *Davis v. Michigan Department of the Treasury*, 489 U.S. 203.

Almost immediately, Wisconsin knew it had a serious problem on its hands and, first, legislatively expanded the exemption to federal retirees and, second, the Secretary of Revenue requested an opinion from the state Attorney General as to the effect of the *Davis* case in Wisconsin, which it has secreted behind its attorney-client privilege.

The instant refund litgation was also commenced in 1989, first in the courts and then in 1991 with this commission.

Now what I consider to be the linchpins of this case. They are 4 U.S. Code 111 and the *Davis* case.

4 United States Code 111 provides in part—and once again, hopefully for the last time, I quote—"The United States consents to the taxation of pay or compensation for personal services of an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of that pay or compensation." I repeat and quote for the last time, "if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation".

[8] The exemption here before us favoring state and local pensioners over federal pensioners is facially discriminatory and does not—does not—meet the source test contained in 4 U.S. Code 111 and/or the intergovernmental immunity standard as enunciated by the United States Supreme Court in the *Davis* case.

Before entering an order in this matter, I feel I must address the issues raised by the respondent in its most recent brief, even though some have been raised for the very first time.

First, the Department complains that this commission did not give it enough time to adequately prepare. I find this allegation to be not only untrue but somewhat offensive. This case has been going on for four years; it has been before us for almost two years. I would think that should be more than sufficient time for the respondent to prepare its defense.

We have carefully and exhaustively considered and reconsidered each and every argument made by both parties. One need just consider the large box on my left, which contains the record, to verify this conclusion.

As mentioned earlier, the Wisconsin Tax Appeals Commission is only the second rung of a six-rung appeal

ladder. If each rung takes as long as this one, we'll be in the next century before it's concluded, and by that time many of the elderly pensioners in this case will have been elevated to a higher place where hopefully they won't have to deal with taxes at all.

[9] Also replete in the respondent's brief and attachments in the specter of money. Some estimates place that at over one hundred million dollars—money it is alleged the State can't afford to pay back.

The monetary cost involved in this matter simply cannot and has not been a factor in this decision. To do so would render this commission a useless rubber stamp appendage to the state budget process, and we reject that.

As I stated earlier, this decision has been reached based solely on the law of the land as I understand it to exist as applied to the facts of this case.

The respondent maintains that it should not now be penalized for acting in good faith in the past. This commission has never alleged that the State has not acted in good faith. Unfortunately, actions taken in good faith sometimes turn out to be mistakes made in good faith, mistakes that must be corrected.

As far as punishment is concerned, the Department of Revenue has that shoe on the wrong foot, as well. To not correct this mistake would be to punish the innocent federal pensioners who are involved, not the State of Wisconsin.

The respondent argues that the State has a constitutional duty to protect the exempted Wisconsin employees' contractual constitutional rights. That may well be true, but what about the federal pensioners' constitutional equal rights? Under our system of government, you cannot trade off one group's [10] constitutional rights for another's.

Besides, the solution was obvious. The State could have retained the federal pensioners' exemption that it chose to repeal in the mid '60s, and that is exactly what

it did in 1989 when the *Davis* case exploded on the scene.

The respondent also argues that the *Davis* case doesn't control in Wisconsin because in Michigan there was a blanket exemption for all state employees, whereas in Wisconsin there was only a partial, select exemption. This argument is unpersuasive. Discrimination is discrimination is discrimination, whether it's total or partial. The *Davis* case and 4 U.S. Code 111 apply and control in both states.

For the first time, finally—final argument—for the first time the Department of Revenue advances an economic loss theory that it complains it didn't have time to fully develop. Under this new theory, the petitioners really only suffered minor economic losses and their recovery, if any, should be limited to $264,000, based on the same hybrid formula used recently in the Arizona Tax Court case of *Bohn, et al. versus Waddell et al.*

$264,000 for up to 25,000 federal pensioners? We reject this approach. Not only is it undocumented and speculative, it also trivializes these federal pensioners' rights.

Despite all the hyperbole and reams of paper we have seen and examined over the last two years, at this final stage [11] this matter is really quite simple.

First, did the State of Wisconsin during the years involved take from these group of taxpayers monies in the form of income taxes it was not entitled to?

Second, if yes, must it refund these monies together with statutory additions, such as interest?

The Wisconsin Tax Appeals Commission finds the answers to both of these questions to be yes.

Therefore,

IT IS HEREBY ORDERED

That the petitioners and the members of the certified class are entitled to judgment as a matter of law, and their motion for summary judgment is hereby granted.

Rendered this day in Madison, this 27th day of May, 1993, by Thomas R. Timken, presiding Commissioner.

I have two final duties to perform.

First of all, I would like to distribute to the parties a memorandum indicating we have ruled on this today, and I would ask you to distribute that to both parties.

[Memorandums presented to petitioners and respondent]

COMMISSIONER TIMKEN: Attached to it, you will find a notice of appeal rights. Obviously, you gentlemen are very familiar with that but we're required to give that to you anyway.

MR. CRONIN: Thank you.

COMMISSIONER TIMKEN: And finally, I will say that this [12] oral decision will be reduced to written form in the form of a transcript and will be available to the parties by 2 o'clock.

There being nothing further to consider, the hearing is closed.

[The hearing closed at 10:15 a.m.]

APPENDIX H

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Docket Nos. 92-I-114 through 92-I-156

GEORGE W. and JUANITA ALLEY, *et al.*
c/o Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.
111 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202-4803,
Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,
Respondent.

ORDER

On May 27, 1993, this Commission issued an Oral Order Granting Petitioners' Class Motion For Summary Judgment in the matter of *J. Gerard and Delores M. Hogan, et al., petitioners, vs. Wisconsin Department of Revenue, respondent,* Docket No. 91-I-386.

The petitioners in the above-entitled matter being members of the certified class in *Hogan,*

IT IS ORDERED: That the respondent's action on the petitioners' claims for refund in the above-entitled matter is reversed.

Dated at Madison, Wisconsin, this 27th day of May, 1993.

WISCONSIN TAX APPEALS COMMISSION

/s: THOMAS R. TIMKEN
Commissioner

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Docket Nos. 93-I-43 through 93-I-191

PHYLLIS M. and MARVIN G. ANDERSON, *et al.*
c/o Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.
111 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202-4803,
Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,
Respondent.

ORDER

On May 27, 1993, this Commission issued an Oral Order Granting Petitioners' Class Motion For Summary Judgment in the matter of *J. Gerard and Delores M. Hogan, et al., petitioners, vs. Wisconsin Department of Revenue, respondent,* Docket No. 91-I-386.

The petitioner in the above-entitled matter being members of the certified class in *Hogan,*

IT IS ORDERED: That the respondent's action on the petitioner's claims for refund in the above-entitled matter is reversed.

Dated at Madison, Wisconsin, this 27th day of May, 1993.

WISCONSIN TAX APPEALS COMMISSION

/s/ THOMAS R. TIMKEN
Commissioner

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Docket Nos. 92-I-363-SC and 92-I-364-SC

MICHAEL A. FREDERICK, *et al.*
c/o Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.
111 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202-4803,
Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,
Respondent.

ORDER

On May 27, 1993, this Commission issued an Oral Order Granting Petitioners' Class Motion For Summary Judgment in the matter of *J. Gerard and Delores M. Hogan, et al., petitioners, vs. Wisconsin Department of Revenue, respondent,* Docket No. 91-I-386.

The petitioners in the above-entitled matter being members of the certified class in *Hogan,*

IT IS ORDERED: That the respondent's action on the petitioners' claims for refund in the above-entitled matter is reversed.

Dated at Madison, Wisconsin, this 27th day of May, 1993.

WISCONSIN TAX APPEALS COMMISSION

/s/ THOMAS R. TIMKEN
Commissioner

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Docket Nos. 93-I-343-SC and 91-I-465-SC

EUGENE A. and LORRAINE O. HAFNER
c/o Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.
111 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202-4803,
Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,
Respondent.

ORDER

On May 27, 1993, this Commission issued an Oral Order Granting Petitioners' Class Motion For Summary Judgment in the matter of *J. Gerard and Delores M. Hogan, et al., petitioners, vs. Wisconsin Department of Revenue, respondent,* Docket No. 91-I-386.

The petitioners in the above-entitled matter being members of the certified class in *Hogan,*

IT IS ORDERED: That the respondent's action on the petitioners' claims for refund in the above-entitled matter is reversed.

Dated at Madison, Wisconsin, this 27th day of May, 1993.

WISCONSIN TAX APPEALS COMMISSION

/s/ THOMAS R. TIMKEN
Commissioner

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Docket No. 91-I-128-SC

TONY M. PERUSHEK
c/o Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.
111 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202-4803,
Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,
Respondent.

ORDER

On May 27, 1993, this Commission issued an Oral Order Granting Petitioners' Class Motion For Summary Judgment in the matter of *J. Gerard and Delores M. Hogan, et al., petitioners, vs. Wisconsin Department of Revenue, respondent,* Docket No. 91-I-386.

The petitioner in the above-entitled matter being members of the certified class in *Hogan,*

IT IS ORDERED: That the respondent's action on the petitioner's claim for refund in the above-entitled matter is reversed.

Dated at Madison, Wisconsin, this 27th day of May, 1993.

WISCONSIN TAX APPEALS COMMISSION

/s/ THOMAS R. TIMKEN
Commissioner

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Docket No. 90-I-423-SC

KATHERINE PIRNER
c/o Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.
111 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202-4803,
Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,
Respondent.

ORDER

On May 27, 1993, this Commission issued an Oral Order Granting Petitioners' Class Motion For Summary Judgment in the matter of *J. Gerard and Delores M. Hogan, et al., petitioners, vs. Wisconsin Department of Revenue, respondent,* Docket No. 91-I-386.

The petitioner in the above-entitled matter being members of the certified class in *Hogan,*

IT IS ORDERED: That the respondent's action on the petitioner's claim for refund in the above-entitled matter is reversed.

Dated at Madison, Wisconsin, this 27th day of May, 1993.

WISCONSIN TAX APPEALS COMMISSION

/s/ THOMAS R. TIMKEN
Commissioner

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Docket No. 89-I-339-SC

CHRISTOPHER and JUDE M. SHERIDAN
c/o Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.
111 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202-4803,
Petitioners,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, WI 53708,
Respondent.

ORDER

On May 27, 1993, this Commission issued an Oral Order Granting Petitioners' Class Motion For Summary Judgment in the matter of *J. Gerard and Delores M. Hogan, et al., petitioners, vs. Wisconsin Department of Revenue, respondent,* Docket No. 91-I-386.

The petitioners in the above-entitled matter being members of the certified class in *Hogan,*

IT IS ORDERED: That the respondent's action on the petitioners' claims for refund in the above-entitled matter is reversed.

Dated at Madison, Wisconsin, this 27th day of May, 1993.

WISCONSIN TAX APPEALS COMMISSION

/s/ THOMAS R. TIMKEN
Commissioner

STATE OF WISCONSIN
TAX APPEALS COMMISSION

Docket No. 90-I-393-SC

HENRY G. (DEC'D) & EVELYN THORESON
c/o Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.
111 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202-4803,
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WISCONSIN TAX APPEALS COMMISSION

/s/ THOMAS R. TIMKEN
Commissioner

APPENDIX I

WISCONSIN TAX APPEALS COMMISSION

Docket No. 91-I-386

J. GERARD and DELORES M. HOGAN, *et al.*,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

STATEMENT OF COMMISSIONER DOUGLASS H. BARTLEY

1. Pursuant to my obligations as a Commissioner of the Wisconsin Tax Appeals Commission, I wish to advise the parties to this case of certain events. These events, when considered as a whole, amount to an attempt on the part of the executive branch of state government to compromise the independence and integrity of the Tax Appeals Commission. Because of the seriousness of the conclusion I have drawn from these events, I am describing in significant detail the facts that lead me to this conclusion.

2. I have served as a Commissioner on the Tax Appeals Commission since April of 1987 when I was appointed by Governor Thompson as one of two part-time Commissioners.

3. In 1991, the two part-time positions were being eliminated in budget cuts, so I applied for the full-time position that had become available upon the resignation of Commissioner Wagner-Malloy. Governor Thompson's Appointments Director, Ms. Pat Reuter, arranged for me

to meet with Governor Thompson's chief-of-staff, Ed Marion, to whom the task of appointing a successor Commissioner had been delegated.

4. I met with Mr. Marion in the Governor's offices in Madison in early December 1991. Mr. Marion explained that the Governor had turned the matter of my appointment over to him to resolve . I stated that because I loved the work I would be very pleased to take the job, but that I would accept it only with the express promise that I would be reappointed by Governor Thompson for a full 6-year term after finishing the remaining 1+ year of the Wagner-Malloy term, expiring March 1, 1993. Mr. Marion told me he thought my request concerning reappointment was reasonable and said he would have an answer for me by December 11.

5. On approximately December 13, 1991, I received a call from Mr. Marion who said that the Governor had agreed to my appointment. I reminded Mr. Marion of the condition that I be promised the reappointment to the subsequent 6-year term, and Mr. Marion immediately confirmed that this promise was part of the deal. I remember this very well, because Mr. Marion assured me that the Governor didn't want me for just one year, and that the subsequent appointment was mine, "as long as I didn't do anything unnatural with sheep", as Mr. Marion jokingly put it. I thanked Mr. Marion for the prompt and professional way he had handled the matter.

6. A day or two later I heard directly from the Governor, who asked me, "Are you happy", to which I replied, "Yes, very happy." I expressed concern about the other part-time Commissioner, Robert Junceau, who also had applied for the full-time job I had received. The Governor assured me that they would find something for him to do.

7. On May 18, 1992, the Tax Appeals Commission released a ruling in the instant case, *Hogan et al. v. Wisconsin Department of Revenue, et al.*, holding (1)

that the Tax Appeals Commission had jurisdiction over the tax claims in issue, and (2) that if the tax discrimination claims were found to be meritorious, retroactive relief was proper and refunds (of some $70-90 million for 30,000 claimants) would be ordered back to 1984. I authored the ruling and was joined by Commissioners Thomas R. Timken and Robert C. Junceau.

8. The Department of Revenue sought reconsideration of the retroactive relief portion of our ruling. The taxpayers sought to have that part of the ruling reaffirmed and also requested class certification.

9. On October 28, 1992, after extensive briefing, we reaffirmed our earlier ruling that if successful on the merits, taxpayers could collect refunds back to 1984. We also held that the taxpayers could proceed as a class before the Commission.

10. On Friday, October 30, 1992, our ruling was reported in the Madison edition of the *Milwaukee Sentinel*. That day, I received a call from Mr. Marion (who was still chief-of-staff), who told me that the Department of Revenue was very upset with the class certification ruling.

11. On November 6 and November 17, 1992 we issued further rulings in *Hogan*. On approximately November 18, 1992, I received a telephone call from Tax Appeals Commission Chairman Mark Musolf concerning the *Hogan* case. Mr. Musolf had recused himself from the *Hogan* case because he had been a defendant in the case in his former capacity as Secretary of the Department of Revenue. Mr. Musolf nonetheless said about my *Hogan* opinion, "How can you do this when your appointment is up?" He also said, "You're making a laughing stock of the Commission." Although I felt pressured by the call, I discounted my feelings, and as it ended I told him that I would consider this a friendly call. I subsequently told my fellow Commissioner, Thomas R. Timken, about the call.

12. Subsequently, the Department of Revenue asked us to reverse the class certification portion of our *Hogan* ruling. On February 16, 1993, Commissioner Timken and I issued a ruling denying the state's request, and set a scheduling conference for March 1.

13. On February 23, 1993, I faxed a letter to Appointments Director Pat Reuter concerning my compensation following my upcoming reappointment to the Tax Appeals Commission. I asked for a 4% annual salary increase.

14. On approximately March 2, Ms. Reuter called me and said, "the Governor told me to tell you he was not amused" by my letter. Ms. Reuter explained that Governor Thompson likes to set the salaries himself, and that my reappointment was not secure. I explained that the reappointment had been promised in my December 1991 discussions with Mr. Marion, who had said he was acting with Governor Thompson's authority. Ms. Reuter said she would discuss the matter with the Governor and get back to me by the end of that week.

15. After the call, I placed a call to Mr. Marion, who now is in private practice, and left a message for him to call me.

16. On March 1, 1993, we had a scheduling conference in *Hogan*. At the conference, the state agreed to turn over computer disks containing taxpayers' names and addresses to taxpayers' counsel so that approximately 20,000 of the 30,000 federal pensioners could be personally notified of the litigation and of their right to opt out of the class we had certified.

17. On March 4, at a status conference, counsel for the state reneged on the state's promise to turn over the disks, citing confidentiality of the records as its reason. I overruled the objection, and asked when the disks would be supplied as promised. The state's ocunsel, Kevin B. Cronin, replied that he had not been authorized to release

the names. I asked that he immediately secure the authorization, and adjourned the conference for 15 minutes so that he could speak to the current Secretary of the Department of Revenue, Mark Bugher, to get it. After the recess, Mr. Cronin told us that Mr. Bugher would not authorize the release. Mr. Eugene O. Duffy, the pensioners' attorney, moved for an order requiring the release, and I said I would sign it and would require release by noon the next day. I signed the proposed order that afternoon, and added a paragraph stating that sanctions would be imposed if the state did not comply.

18. The next day, Friday, March 5, at 10:45 a.m., the state did agree to comply, and that afternoon the disks were delivered to Mr. Duffy.

19. On Saturday ,March 6, Mr. Marion returned my prior call. I asked him to listen to my recollection of our December 1991 discussions about my employment arrangements, and he confirmed that he remembered the discussion described in paragraph 5 above. In particular, Mr. Marion remembered his "unnatural with sheep" remark, the fact that I had been promised the reappointment, and how important it had been to me to have that promise. Mr. Marion said that he remembered that the reappointment promise had been the reason I had accepted a lower salary. He also said that he had told Ms. Reuter that I had been promised the appointment and that he would be seeing the Governor that evening and would remind him of the promise.

20. On March 24, 1993, I received a call from Ms. Reuter. She said the purpose of her call was to ask me to attend an interview the following Monday concerning whether I should be reappointed. I asked her whether Mr. Marion had confirmed that I already had been promised the reappointment. She replied, "Not exactly." I then asked her who were the interviewers, and she told me the Governor's Legal Counsel, the state Director of Employment Relations, the state Treasurer, and Pat herself.

I asked the purpose of the interview, and Ms. Reuter explained that I would be asked to discuss my goals and objectives. I agreed to appear.

21. Over the next 24 hours, I reflected on the events described herein and concluded that it would not be appropriate for me to appear. Based upon the previous events, I was concerned that they would want to talk about the pending *Hogan* litigation, which I believed would be improper, or that the meeting was intended merely to justify a decision that already had been made not to reappoint me. I could see no proper purpose for the meeting, since I had by that time served nearly 6 years as a part and full-time Commissioner, had been praised many times for my work by my colleagues, by tax practitioners, by Revenue Secretary Bugher and by Governor Thompson himself, and had been expressly promised the full six-year term.

22. Therefore, I faxed a letter to Ms. Reuter on Friday, March 26 at approximately 1:30 p.m. I explained again what had occurred and that I saw no proper purpose for such a meeting.

23. On Monday, March 29, at about 1:30 p.m., Joe Ziesel of the Tax Appeal Commission's office in Madison told me that the Commission received a fax from Governor Thompson's Chief-of-Staff, William McCoshen, insisting that I attend that afternoon's 3:30 meeting or reschedule, or they would "proceed accordingly."

24. At about 2.:30 that same afternoon, I received a call from Mark Musolf. Mr. Musolf encouraged me to attend the interview, but also said he "knew that Mark Bugher was very unhappy with me because of the *Hogan* case." He also said that he had received calls that day from Mr. McCoshen and Ms. Reuter, and that he had told Mr. McCoshen that I might reconsider and get in touch with them tomorrow. I told Mr. Musolf that I was not going to reconsider.

25. On Thursday, April 1, at about 10:00 a.m., I received a call from Mr. McCoshen, who told me that the Governor was going to announce that afternoon the appointment to the Tax Appeals Commission of Joe Mettner. Mr. Mettner is a former law clerk and lawyer for the Department of Revenue. Mr. McCoshen said that he had talked to Mr. Marion the previous Monday and that no reappointment commitment had been made. Mr. McCoshen then added, "But even if he did make a commitment to you, he would have had no power to do so, as no Chief-of-Staff has that power." I then asked whether the decision was final and McCoshen said "Yes." I asked him when the appointment would take effect, and he said upon the Senate's confirmation of Mr. Mettner.

26. When I assumed my duties as a Commissioner of the Wisconsin Tax Appeals Commission, I took an oath to support the Wisconsin constitution and to "faithfully and impartially discharge the duties of the office." In deciding what course to take in response to the events described above, I am guided by the Code of Judicial Ethics, Supreme Court Rules Chapter 60, which state as follows:

> (1) A judge should be mindful that ours is a government of law and not of men and should not permit his or her personal concept of justice to override the law. A judge should administer his or her office with due regard to the integrity of the system of law itself, remembering that he or she is not a repository of arbitrary power but a judge under the sanction of law.

SCR 60.01. Thus, with "due regard to the integrity of the system of law itself", and in recognition of the need to "administer the law free of partiality and the appearance of partiality", I believe the necessary course is for me to recuse myself from further proceedings in the *Hogan* litigation.

Dated this 8th day of April, 1993.

/s/ Douglass H. Bartley
DOUGLASS H. BARTLEY

APPENDIX J

WISCONSIN TAX APPEALS COMMISSION

Docket No. 91-I-386

J. GERARD and DELORES M. HOGAN, *et al.*,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

ORDER DENYING TAXPAYERS' MOTION FOR RECONSIDERATION OF RECUSAL

Appearances: For taxpayers: Eugene O. Duffy, Esq. For department: Kevin B. Cronin, Esq.

Bartley, Commissioner:

As much as I am sympathetic to the troubles my original recusal decision may cause the pensioners, the decision will have to stand.

When I first decided to recuse, I realized that my continued participation in the case would, given the backdrop of misconduct at the highest levels of the executive branch, at best cloud and at worst invalidate any decision I reached on the merits in favor of the pensioners. I could foresee, years from now perhaps, the real possibility of an appellate court remanding the case to attenuate a perceived taint caused by my presence. My disqualification was not motivated by any actual lack of objectivity, but by a desire to purge the case of any appearance of partiality that could result in the taxpayers having to start all over again, a third time, to have their claims resolved.

Since the recusal, nothing has happened that leads me to believe that the original decision was wrong. Indeed, the propriety of the decision has been confirmed by the fact that the state has formally made the claim that it's

not possible for me to be objective toward it, which suggests to me that were I to remain and rule against the state, my participation would become the state's main and perhaps only defense to paying over the refunds. My recusal will cut-off that line of collateral attack and force the state to argue the case on the merits, something it so far has been loathe to do.

Thus it is that I affirm the original recusal.

I realize that my recusal creates a jurisdictional vacuum in that the commission, insofar as this case is concerned, may be irretrievably paralyzed due to the lack of a quorum. I note also that the state, apart from having ultimately created the circumstances leading to my own recusal and the commission's temporary paralysis, has perpetuated that paralysis by the Governor's recruiting and appointing yet another commissioner who cannot participate in this case. I must leave it to others to decide whether the new appointment was the result of incompetence or was part of a "Pension-Gate" scheme designed to delay the case and defeat the claims by creating a possibly-permanent jurisdictional snarl.

However, I will say that the delay that will be occasioned by the jurisdictional snarl wouldn't be a first in the case. Seldom have I witnessed more stonewalling than the state has done here including reneging on its promise to turn over the computer disks to the taxpayers; seeking much more time to gather evidence to show that state employees were underpaid in relation to their federal counterparts—only to announce months later that the pay disparity was only a "theory" which it needed even more time to develop; and engaging in other maneuvers designed only to drag these proceedings on to avoid reaching the merits.

Dated at Mequon, Wisconsin, April 22, 1993.

/s/ Douglass H. Bartley
DOUGLASS H. BARTLEY

APPENDIX K

WISCONSIN TAX APPEALS COMMISSION

Docket No. 91-I-386

J. GERARD and DELORES M. HOGAN, *et al.*,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

ORDER FOR CLASS CERTIFICATION

The above-entitled matter was originally submitted to the Commission for decision on the 29th day of August, 1992 and submitted to the Commission for reconsideration on the 15th day of January, 1993, Commissioner Douglass H. Bartley, presiding and joined by Commissioner Thomas R. Timken. The petitioners and the petitioner class appeared by their counsel, Attorney Eugene O. Duffy, Esq., of O'Neil, Cannon & Hollman, S.C. The respondent appeared by its counsel, Kevin B. Cronin, Esq. The motion of the respondent to dismiss class action, the motion of the petitioners to certify the class, and the motion of the respondent to reconsider the Commission's decision regarding class certification having been submitted, and the Commission having considered the extensive files, records and proceedings heretofore had in this action, including the extensive submissions of counsel in support thereof and having decided said motions as set forth in the RULING AND ORDER ON MOTIONS OF THE COMMISSION issued by the Commission on October 28, 1992, the REVISED RULING AND ORDER ON MOTIONS, issued by the Commis-

sion on November 6, 1992, and the RULING AND ORDER ON MOTION FOR RECONSIDERATION, issued by the Commission on February 16, 1993,

BASED UPON THE FOREGOING AND PURSUANT TO THE COMMISSION'S RULING AND ORDER ON MOTIONS, issued October 28, 1992, the REVISED RULING AND ORDER ON MOTIONS, issued November 6, 1992, and the RULING AND ORDER ON MOTION FOR RECONSIDERATION, issued by the Commission on February 16, 1993, the COMMISSION HEREBY FINDS AND CONCLUDES:

1. The issue before the Commission in this action involves a common and general interest shared by all of the members of the class; the named petitioners in this action, fairly represent the interests involved in this litigation; and in view of the fact that the class includes not less than 25,000 persons, it would be impractical to bring all the parties before the Commission. Accordingly, this action is properly brought under Wis. Stat. § 803.08 as a class action. Moreover, in view of the nature of the rights in issue in this case, and the fact that this extremely large class consists, in substantial part, of elderly class members, the Commission is of the view that it is compelled to exercise its discretion in favor of certifying the class in order to protect the constitutional interests here involved.

2. The Commission also finds that the named petitioners' interests are not in conflict with other members of the class. In addition, the named petitioners' attorneys are qualified, experienced and able to conduct this litigation.

3. The Commission also takes note from the very outset of this litigation, the named petitioners and their counsel, as evidenced by the steps initiated immediately upon the commencement of

this litigation, are diligently, competently, and zealously litigating this action.

BASED UPON THE FOREGOING,

IT IS ORDERED, that the class represented by the named petitioners as class representatives be, and it is certified as follows:

All present and former Wisconsin residents, who paid or were subject to Wisconsin income taxes on the retirement benefits paid to them by the United States government for any one or more of the tax years 1984, 1985, 1986, 1987 and 1988, and who are members of any of the following subgroups:

i) all natural persons who are retired federal civilian employees and/or U.S. military (both active and reserve from all branches of the Armed Services and the U.S. Coast Guard) personnel, and who were members of a United States Government retirement system or fund as of December 31, 1963, including all such persons who by operation of federal law have a constructive date of employment or service on or before such date for purposes of eligibility for retirement;

ii) all natural persons who are retired federal civilian employees and U.S. military (both active and reserve, from all branches of the Armed Services and the U.S. Coast Guard) personnel and who were retired under a United States Government retirement system or fund as of December 31, 1963;

iii) all natural persons who are the survivors of any persons in i) or ii) above and who are or were receiving a survivor annuity in any of the years enumerated above under a United States Government retirement system or fund; and

iv) the executors, personal representatives, legal representatives or successors in interest of or to any

of the natural persons identified above as are now deceased or otherwise under legal disability;

and excepting from said class the named plaintiffs in *D'Amico, et al. v. Wisconsin Department of Revenue, et al.*, Circuit Court for Dane County, 89 CV 2344, including the members of the Wisconsin Military Retirees Alliance, as specifically identified in the Notice of Opting Out of Class, which has previously been served upon counsel for the petitioners and the respondent.

Counsel for the named petitioners, Eugene O. Duffy as assisted by Gregory W. Lyons, William A. Wiseman and Dean P. Laing, all of the law firm of O'Neil, Cannon & Hollman, S.C. of Milwaukee, Wisconsin, shall be sole lead counsel for the petitioner class.

The Commission further concludes that it shall postpone the consideration of the manner and timing of class notice until its scheduling conference on March 1, 1993.

Dated at Madison, Wisconsin this 23rd day of February, 1993.

(Not Participating)
MARK E. MUSOLF

/s/ Thomas R. Timken
THOMAS R. TIMKEN

/s/ Douglass H. Bartley
DOUGLASS H. BARTLEY

APPENDIX L

WISCONSIN TAX APPEALS COMMISSION

Docket No. 91-I-386

J. GERARD and DELORES M. HOGAN, *et al.*,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

RULING AND ORDER ON MOTION FOR RECONSIDERATION

Bartley, Commissioner, joined by Timken, Commissioner:

I.

BACKGROUND AND ARGUMENT

The state seeks reversal of our revised ruling[1] that taxpayers, who are federal pensioners, can proceed as a class in their attempt to recover Wisconsin income taxes they paid on their federal pensions in 1984-88.

In that ruling, we noted that the statutes gave us the authority to prescribe rules of practice and procedure, and that pursuant to that authority, we had prescribed a rule that incorporated the rules of civil procedure courts follow. We reasoned that because the rules of civil procedure explicitly allow class actions, class actions were made part of the commission's "authorized procedural machinery"; and went on to hold that because the state had not objected either to the composition

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[1] November 5, 1992, clarified November 17, 1992.

of the class or to the class attorney's qualifications, class and attorney would be certified.[2]

As a result, we held that the class would include all federal pensioners who had paid Wisconsin income taxes on their federal pensions in any of the years 1984-88 and who had been members of a federal retirement program as of December 31, 1963, that date being the parallel membership date certain Wisconsin state and local pensioners (for convenience's sake, "state pensioners") by statute had to meet to qualify to have their pensions exempted from tax.[3]

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[2] In our revised ruling, we abandoned the rationale of our original ruling, where we had "piggybacked" our class certification on Judge Jones's earlier identical certification. In abandoning the piggyback approach, we reasoned that Judge Jones had had no subject matter jurisdiction over the prior case, and thus his certification order was void.

Query: Were we hasty in confessing "error"? Does § 807.07(2) (1989-90) (another rule of civil procedure) operate to salvage Judge Jones's order?

> "If the tribunal from which an appeal is taken [Judge Jones's court?] had no jurisdiction of the subject matter and the court to which the appeal is taken [the commission?] has such jurisdiction, the court [the commission?] shall, if it appears that the action or proceeding was commenced in good faith and belief that the first named tribunal [Judge Jones?] possessed jurisdiction, allow it to proceed as if originally commenced in the proper court [the commission?] and shall allow the pleadings and *proceedings* to be amended accordingly; and in all cases in every court where objection to jurisdiction is sustained the cause shall be certified to some court [the commission?] having jurisdiction, provided it appears that the error arose from mistake." (Emphasis added.)

If by virtue of our adoption of the rules of civil procedure, we are the equivalent of "the court" in the statute, does the statute mean that Judge Jones's certification order was a "proceeding" that survives at the commission level to be amended by us accordingly as if we had entered it originally?

[3] § 71.05(1)(a), Wis. Stats. (1987-88), quoted at n. 49, *infra*.

In support of its motion for reversal, the state poses four arguments on why the case can't be heard as a class action: (1) "[c]lass action proceedings are inherently equitable proceedings"; the commission has no equitable jurisdiction; therefore; the commission has no authority to hear class actions; (2) to have the case proceed as a class action would abrogate the state's "absolute statutory right" to examine each of 25,000 members of the class under oath; (3) sovereign immunity (precluding claims against the state unless expressly allowed) precludes class tax refund claims in that the refund claim statute makes no mention of such claims; and (4) taxpayers don't need to utilize class actions, because an individual taxpayer victory is a *stare decisis* victory adequate in and of itself for all other taxpayers with like tax controversies.

The state also raises the alternative argument: (5) that even if the case can proceed as a class action, the commission's class certification was improper in this instance, (A) because the commission "summarily certifie[d]" the class without considering whether the class composition was appropriate; and (B) (i) because the commission defined the federal class too broadly, failing to consider "a host of issues" including whether the federal class should have excluded various non-similarly-situated federal pensioners including those who had no 1963 Wisconsin tax filing obligations, who weren't city or county of Milwaukee residents in 1963, who had had jobs that weren't comparable with the jobs of exempt pensioners, who weren't members of an annuity or retirement fund as that term is defined in the Wisconsin statutes, whose pensions didn't derive from public employee contract rights, or who were merely "constructive members" of a federal retirement plan on December 31, 1963.

In addition, the state suggests that the exemption was "truly intended to account for differences in retirement benefits"; one again exhorts us to recognize that the rul-

ing in *Davis v. Michigan Department of Treasury*,[4] where the Supreme Court in 1989 sustained a federal pensioner's claim for a state's discrimination in its taxation of his pension, was prospective only and applies only to tax years after 1988; and mentions "actuarial issues involved in setting such Milwaukee and state teacher retirement benefit levels".

Finally, the state argues (ii) that we failed to recognize that Wisconsin's exemption is a "partial exemption" that doesn't exempt all state pensioners, but only some, and the class we certified would give some dissimilarly-situated federal pensioners an "unfair windfall" at the expense of state pensioners who don't qualify.

II.

ANALYSIS AND CONCLUSIONS OF LAW

1. *Does the commission have authority to certify classes?*

To repeat, here the state's argument is: "[c]lass action proceedings are inherently equitable proceedings"; the commission has no equitable jurisdiction, its powers being limited to those granted in the statute; therefore, the commission has no authority to hear class actions.

We need not reach the question whether class actions are inherently equitable proceedings,[5] for the claim that the commission has no "equitable jurisdiction" is a red herring. Although accurate to the extent it suggests that the commission has no jurisdiction beyond those matters within its statutory jurisdictional grant, the state's claim

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[4] 489 U.S. 803 (1989).

[5] As taxpayers note, tax refund proceedings themselves are inherently equitable, deriving as they do from the equitable action for "unjust enrichment". *See George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 378 (1933). The state's argument thus creates the absurdity that taxpayers identify: "each and every time the commission [orders a refund], it is at the same time exceeding its jurisdiction."

ignores the reality that the commission's jurisdictonal statute itself gives us "equitable jurisdiction", or more properly put, jurisdiction to apply equitable principles in deciding questions of law in tax disputes.

As we said in an earlier ruling in this case,[6] the commission's statutory jurisdiction includes jurisdiction over "*all* questions of law and fact arising under [the various tax laws of the state]."[7] Because law and equity merged many years ago, it follows that the question of the application of equitable principle in a tax case is a "question of law" jurisdictionally no different from any other question of law we have to resolve in virtually every case we have.

In short, what once were solely questions of equity are now questions of law. So even if the question whether a case can proceed as a class action is a question that turns on "inherently equitable" considerations and was originally a question of equity, we can, indeed we are *statutorily obliged* to, decide the issue.[8]

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[6] ¶ 203-336 Wis. Tax Reporter (concerning recusal motion).

[7] § 73.01(4) (1989-90) (emphasis added).

[8] We should note that although we clearly have jurisdiction to apply equitable principles to legal and procedural questions presented, generally we have no jurisdiction to fashion equitable *relief*. The statutes appear to limit our remedial powers and orders to affirming, reversing, or modifying decisions the department has made. § 73.01(4) (1989-90) (speaking in context of agreed cases, the power of "affirmance, modification, or reversal"). Therefore, for example, we can't order specific performance of contracts or issue injunctions, except, of course, to the extent that any decision we make carries with it an implicit set of directions or mandate to the litigants to carry out.

We should also note that there may well be exceptions to the general rule we stated above explicit or implicit in the statutes, particularly in the rules of civil procedure we have adopted. For example, we can issue orders requiring litigants to complete discovery by a certain date or to appear at a pretrial conference. These types of orders perhaps could be thought of as having an

Moreover, though the class action procedure may have had its origins in equity, it is an equitable procedure that has become part of our established apparatus-at-law, a statutorily-recognized rule of civil procedure in cases at law in Wisconsin courts. And as we noted in the earlier ruling, because we as an agency are statutorily obliged to adopt rules of practice and procedure,[9] 'and because we have adopted, *mutatis mutandis,* the rules of civil procedure courts follow,[10] we have thereby adopted, as part of our tax resolution procedure, the rule dealing with class actions.

In sum, whether class actions are equitable or not is beside the point, for today equity and law are for the most part indistinguishable, and the law governing tax litigation procedure has absorbed the "equitable" class action procedure as part of the law's tax resolution process.

2. *Does a class action abrogate the "personal appearance" rule?*

The state argues that to have the case proceed as a class action would abrogate the state's "absolute statutory right" to examine each of 25,000 members of the class under oath. That "right" of cross-examination derives from this statute:

> "No person against whom an assessment of income tax has been made shall be allowed in any action either as plaintiff or defendant or in any other proceeding to question such assessment unless the requirements of [the redetermination process] shall

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injunctive or specific performance aspect to them. But whether they do or not is not important, for even if they do, the power to issue these types of orders has been granted by the legislature's command to us to adopt rules of practice and procedure. *See* § 73.01(4)(b).

[9] *Id.*

[10] Rule TA § 1.39.

> first have been compiled with, and unless such person shall have made full disclosure under oath at the hearing before the tax appeals commission of any and all income received by him or her." [11]

The question here is, "Does the statute require a taxpayer's personal appearance in cases where there are no issues of fact on which the taxpayer can offer any probative evidence?"

No. We find that any right on the part of the state to insist on a taxpayer's personal appearance before the commission is not absolute; rather, whatever right the state has is conditioned on and presupposes the existence of an issue of fact upon which cross-examination of the taxpayer would be appropriate; and here there is none.

We reason that in the liability phase of this case at least, there is no need for cross-examination of any taxpayers, because there are no issues of fact on which any taxpayer can offer probative evidence. The liability question here is whether the Wisconsin taxes that federal pensioners paid on their federal pensions should not, as a matter of law, have been collected, and should be refunded. That liability question turns on whether the exemption statute constituted illegal source discrimination against federal pensioners.[12]

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[11] § 71.89(2) (1989-90). In the abstract the statute raises a number of questions. One is the question, "Does the statute really give the state the absolute right it claims; or is it merely a declaration that a taxpayer, who either doesn't go through the department redetermination process or who does, and appeals to the commission, but who doesn't appear at the tax appeals commission hearing, can't collaterally attack the results in later proceedings such as a civil action to collect the tax or a criminal action for tax evasion?" And if a declaration of collateral estoppel, isn't the statute a preclusion of taxpayer rights to attack, rather than an affirmative grant of a right on the part of the state to insist on personal appearance for cross-examination?

[12] Under 4 U.S.C. § 111, the statute which outlaws discrimination against federal pensioners on account of the source of their pay

The source discrimination question, in turn, turns solely on whether the exemption was "truly intended to account for differences in retirement benefits",[13] which here breaks into two subsidiary questions. First, was there a disparity in benefits? Second, was the exemption truly intended to equalize any disparity?

The first question is a question of fact to be sure, but it is a question the answer to which is within the state's own grasp, not a question on which the individual federal pensioner would have any probative testimony to offer. The second question is entirely a question of law to be resolved with reference to the face of the statute, for if an exemption is "truly intended to account for differences in retirement benefits, . . . it would discriminate on the basis of the amount of benefits received by individual retirees." [14]

Because the individual federal pensioners here can give no probative testimony on either point, and because neither the amount nor character of their pension income, nor as yet the amount of any individual refunds owing, are at issue, there is no need in the liability phase for any personal appearance by any of the pensioners.[15]

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being the federal government. That is basis for the cause of action here.

[13] *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 817 (1989).

[14] It may be here that there is no occasion to get into whether there were any actual disparities in retirement benefits and therefore no need for any examination or cross-examination of anyone at all. For under the rule of *Davis*, it would seem that the mere existence of differences is not enough to sustain the statute; the statute must be tailored so as to truly account for those differences, and if the statute is not so tailored, the differences don't matter. *See Davis*, 489 U.S. at 816-817. We reserve judgment on this point.

[15] We should also note that we have not considered whether any cross-examination would be necessary in the "damages" portion,

3. *Does sovereign immunity preclude class refund claims?*

The state argues that because the refund claim statute makes no mention of class tax claims, such claims are not cognizable given that the doctrine of sovereign immunity [16] disallows any claims that are not explicitly authorized within that statute.[17]

The argument is without merit, because, as we shall see, the legislature has through other statutes allowed the filing of class tax refund claims at the department level and the prosecution of class claims at the commission level.

The first statute we must recognize says, "If a statute requires an act to be done which may legally be done by an agent, such requirement includes all such acts when done by an authorized agent." [18] Thus an agent of a taxpayer can sign and file a refund claim with the department, the legislature having in effect provided that the taxpayer himself need not sign the refund claim for it to be valid. And because an attorney for a class, like any other attorney for a client, is an agent of the clients

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if the case gets to that. There we suppose there might be issues of fact as to whether particular individuals were members of a federal retirement system on December 31, 1963, but even there those issues are probably a matter of public record. In any event, we need not now consider those possible issues, because they don't relate to the liability question.

[16] Sovereign immunity comes from ART. IV, § 27 of the WISCONSIN CONSTITUTION: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

[17] The refund claim statute, § 71.75(1) and (6) (1987-88) states, subject to certain exceptions, that the "only method" for filing claims for refund is for the taxpayer to sign the claim. The state apparently reads this as meaning that a signature by a representative of the taxpayer is insufficient.

[18] § 990.001(9) (1987-88).

he represents, it follows that the refund claim statute embraces a class refund claim filed by a class attorney.

One need only pause for a moment to realize the irrefutability of that conclusion and the error inherent in the state's argument. For if we take the state's argument to its illogical conclusion, it would mean that no representative could ever file any tax refund claim. Thus guardians could never file tax refund claims on behalf of their incompetent wards, and the wards could never collect lawful refunds. Executors could never file refund claims on behalf of their decedents, and the decedents' heirs could never recover refunds. Parents could never file refund claims on behalf of their minor children, and minors could never collect refunds.

So we see that the statutes endorse the filing of class claims at the department of revenue level. The statutes also allow the prosecution of class refund claims at the commission level.

As we said earlier, the commission is statutorily obliged to adopt rules of practice and procedure.[19] The rules we have adopted include a rule that requires us to "substantially follow the practice and procedures before the circuit courts".[20] That rule is a reasonable interpretation. And the circuit court rules of procedure include that rule that allows class actions in appropriate circumstances.[21] Therefore we have the authority to hear cases as class cases.

So the sovereign immunity defense fails, because the statutes, taken as a whole, authorize the filing and prosecution of class tax claims.[22]

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[19] 73.01(4)(b) (1989-90).

[20] Rule TA § 1.39.

[21] § 803.08 (1989-90).

[22] Note that our conclusion comes not from any "interpretation" of any ambiguous statute, but from reading the plain English contained in the statutes.

4. *Is stare decisis a ground for denying class claims?*

Here the argument is that the "normal" *stare decisis* effect of a commission decision in favor of one federal pensioner is adequate relief for all. Apparently the suggestion is that because *stare decisis* exists, class actions aren't allowed.

We need not dwell here on the fact that it's more than a bit hollow to plead *stare decisis* as adequate protection in this case for the nearly 25,000 pensioners who didn't file separate refund claims and who would be precluded from the "magic" of *stare decisis* because the 4-year statute of limitations has expired.

Instead, the point to be stressed is that the argument is irrelevant, for the existence of *stare decisis* and its "remedial" effects for would-be individual claimants with similar cases proceeding separately has no bearing on whether individual claimants can band together as a class. Under our law, class actions are permitted notwithstanding the existence of *stare decisis.* Both peacefully coexist. In fact, in class actions *stare decisis* operates automatically and instantaneously as to all parties involved, while in its normal application, its effect is more remote in that its application turns on a case-by-case determination of whether individual circumstances fit the facts and law of a previous ruling.

To say that *stare* precludes class actions is to ignore the reality that class actions provide a supplemental means of resolving cases, a means that the legislature endorsed not in lieu of *stare,* but in addition to it.

5. *Was the commission's certification wrong?*

A. *Did the commission "summarily" certify the class?*

The state also raises the alternative argument that even if the case can rightly proceed as a class action, the

commission's class certification was improper in this instance, because the commission "summarily certifie[d]" the class without considering whether the class proposed was appropriate.

Did we "summarily certify"? Yes—but. The reason for the summary certification was that the state never challenged the taxpayers' proposed composition of the class. Under those circumstances, we concluded that composition was not an issue.

As much as we would like to say something like, "Mind-reading wasn't a course offering in law school", and, "The state's objection is too late and waived", as it happens, there is authority to the effect that we have an independent obligation to determine the compositional propriety of the proposed class irrespective of the lack of objection.[23]

Because of the apparent requirement, we will consider the specific compositional issue after considering the state's objections to the composition of the class and the method by which we go about defining a class.

B. *Did the commission define the class too broadly?*

(1) *Host of issues objection*

Also as an alternative argument, the state contends that the commission failed to consider a "host of issues" including whether we should have excluded from the federal class various non-similarly-situated pensioners, including those who had no 1963 Wisconsin tax filing obligations, who weren't city or county of Milwaukee residents in 1963, who had held jobs that weren't comparable with the jobs of those whose pensions are exempt, who weren't members of an annuity or retirement fund as that term is defined in the Wisconsin statutes, whose pensions didn't

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[23] *Jackson v. Cutter Lab. Inc.*, 338 F. Supp. 882, 886 (1972 ED Tenn.)

derive from public employee contract rights, and who were merely "constructive members" of a federal retirement plan on December 31, 1963.

Moreover, the state suggests the exemption for state and local pensioners was "truly intended to account for differences in retirement benefits"; poses the question once again whether *Davis v. Michigan Department of Treasury* [24] is prospective; and speaks of "actuarial issues involved in setting such Milwaukee and state teacher retirement benefit levels".

Oddly, the state doesn't elaborate on any of its "host of issues" with its insight into how the issues should be resolved—it says only that the issues exist, leaving us entirely on our own to come up with answers.[25]

But before we proceed to the host of issues, we need to pause to consider the general analytical framework we must use in deciding the proper make-up of the class.

(a) *How to define the class.*

When we are seeking to identify a class of taxpayers allegedly victimized by a discriminatory tax statute, we must necessarily start with the *arguendo* assumption that the statute is an illegal discrimination, recognizing that the process of class certification is not a holding of liability, but essentially a process of defining the universe of putative victims, people who are entitled to complain and recover if the claimed discrimination turns out to be real, and (conversely) people who ought to be bound by a determination that there was no discrimination.

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[24] 489 U.S. 803 (1989).

[25] It may be that this "host of issues" is too vague to consider. Normally, a litigant doesn't raise these sorts of questions without offering at least some guidance toward the answers. However, again because of our apparent independent obligation to define a proper class, we need to consider the issues anyway.

In assuming that illegal discrimination exists, we also assume *arguendo* that the sort of "partial discrimination" inherent in the Wisconsin "partial exemption" [26] also constitutes "full-blown discrimination". One, we suppose, might argue that the exemption is a "partial exemption" in the sense that it favors only a select few state pensioners mainly from Milwaukee County, leaving many, perhaps most, state pensioners out-of-luck; and that, therefore, any discrimination the exemption creates is only partial and therefore so insubstantial or minuscule as to be permissible.

At the heart of that sort of argument lies an implicit assertion, something on the order of, "The fewer and fewer the number of people favored by an exemption, the less and less egregious the resulting discrimination becomes"—leading to some sort of discrimination "vanishing point", a point at which the number of those favored becomes so small as to be *de minimus* in degree and legally inconsequential. That's a highly-dubious proposition.[27]

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[26] *Query* whether the Wisconsin exemption is really rightly called a "partial exemption", for nearly every exemption (one exception being the federal personal exemption) is "partial" in the sense that not everyone can get it. Here although the exemption is "partial" within the universe of state pensioners, it is "total" for those within that universe selected to receive the exemption.

[27] Putting it in its logical converse, the proposition in effect holds that the more people who suffer the discrimination, the less objectionable the discrimination is. The acceptance of such a principle would mean that in a jurisdiction, like South Africa, where blacks greatly outnumber whites, the jurisdiction's segregation laws would be defensible on the grounds that the discrimination makes almost everyone suffer. A cause of action for discrimination does not fail just because many are victimized by it. Indeed one could argue just the opposite—the more people victimized by the discrimination, the more egregious it becomes.

In any event, discrimination is not a matter of degree. As the U.S. Supreme Court once observed:

> "[The] application [of the doctrine of intergovernmental immunity] does not depend upon the amount of the exaction,

But whether dubious or not, the hypothetical argument goes to whether *any actionable discrimination even existed*, a substantive law question that goes to the merits, to a defendant's liability for discrimination, not to class definition or composition. Class composition is a question of standing to sue, a question, as we shall see in greater detail ahead, the sole focus of which is a comparison of the characteristics of the proposed class with those of the favored class.[28] In contrast, the "partialness"

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the weight of the burden or the resulting interference with sovereign independence. * * * The principle is an absolute one wholly unaffected by matters or distinctions of degree . . . ."

Trinityfarm Constr. Co. v. Grosjean, 291 U.S. 466, 471 (1934).

Favoring discrimination need not be "universal" to be illegal. *See Washington v. United States*, 460 U.S. 536, 545 (1983) (under intergovernmental immunity, a state taxing scheme discriminates against those who deal with the federal government "if it treats *someone* else better than it treats them" (emphasis added)); *Schuykill Trust Co. v. Pennsylvania*, 296 U.S. 113 (Pennsylvania tax scheme held invalid because the burden of the tax was "lifted in respect to *some*" Pennsylvania securities (emphasis added)); *United States v. City of Manassas*, 830 F.2d 530 (4th Cir. 1987), aff'd 485 U.S. 1017 (1988) (invalidating Virginia tax that exempted taxpayers who used certain property of Virginia Port Authority and local transportation districts).

Thus it would appear that the only "substantive effect" that the "partiality" of the exemption has is this: in ultimately determining whether the exemption is a legal (reasonable) discrimination, we would focus on the justification for distinguishing between the particular state pensioners covered rather than on state pensioners as a whole, i.e., whether there was good reason for favoring the particular state pensioners over the federal pensioners. (In doing so, the precise question would be whether the exemption statute reflected the good reason offered. *See Davis*, 489 U.S. at 817, and pp. 8-9, *supra*.)

In any event, that "focus-narrowing effect" and any possible *de minimus* argument are for the merits and not relevant to the matter of class definition.

[28] As we will see, the "partialness" of the exemption and the resulting fact that some state pensioners don't qualify for the exemption does not operate to defeat the standing of federal

of a discrimination presents no question of class likenesses, but (if anything) only the question whether the "limited degree" of the discrimination vitiates the discrimination altogether.

So, because here we are concerned with class definition, we cast aside any notion of "partial discrimination" as having no bearing on the point.

In this case, therefore, the first step is to assume the truth of taxpayers' allegations that the "partial exemption" statute constitutes illegal tax discrimination against some group of federal pensioners. The question then becomes, "Which ones?" "Which federal pensioners can form a class?"

A "class" is "a group of persons . . . having common characteristics or attributes".[29] One prerequisite for bringing a class action is that "there must be a common or general interest shared by all members of the class",[30] or, put another way, "a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented." [31]

In many class action cases, the delineation of a class is made solely with reference to whether the individuals proposed as a class have, *among themselves*, "a well-defined community of interest".

To take a hypothetical, assume a high-volume used car dealer represents, in mass advertising and sticker labeling, that all his cars had been driven only by little old ladies, knowing full well that the cars only had been

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pensioners—for one group's standing or falls on whether that group *in its own right* has standing, not on the legal standing or status of another non-favored group. *See* p. 35, *infra*.

[29] *Black's Law Dictionary*, 5th Ed. at 225.

[30] *Mercury Records Productions, Inc. v. Economic Consultants*, 91 Wis.2d 482, 283 N.W. 2d 613, 617 (Ct. App. 1979).

[31] *Black's Law Dictionary*, 5th Ed. at 226.

pieced together from parts salvaged from demolition derby gladiators. Assume all other elements of fraud, such as reasonable reliance, are present in a buyers' class action for fraud. The class would be defined as all those who bought the cars, subject of course to the right of individual buyers to opt out. Each plaintiff-buyer would have a "community of interest". Thus in many cases, we define a class only with reference to the characteristic of common harm.

However, in class actions based on statutory discrimination, we must take another step and consider not only the community of interest *among* the plaintiffs, but also what is in effect a "community of interest" between the disfavored plaintiffs and the group favored by the discrimination. The reason for this extra step derives from the nature of discrimination.

"Discrimination" is "the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a larger number of persons, *all of whom stand in the same relation* to the privileges granted and between whom and those not favored no reasonable distinction can be found." [32] It is also defined as "[a] failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." [33]

As the definitions show, with these sorts of class discrimination cases, beyond determining the "internal commonality" of the class (which we take up later on), we need to identify the attributes of those favored to decide whether the disfavored class proposed "*stand*[*s*] *in the same relation to the privileges granted*" as the favored class—in other words to determine whether the disfavored group has enough in common with the favored group to be designated as persons eligible to sue for discrimination,

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[32] *Id.* at 420 (emphasis added).

[33] *Id.*

something we might call the "external commonality" or "external relation", or as the state put it, whether the proposed victims are "similarly-situated" with the favored group.[34]

We should note, however, that we cannot rightly use *all* of the characteristics of the favored group—we must exclude those characteristics that are allegedly-impermissible distinctions, distinctions that create the alleged discrimination, such as the distinction here that the favored group is made up of *state* pensioners whereas the disfavored group are *federal* pensioners. Indeed to include the allegedly-illegal distinction as a necessary characteristic the disfavored class must have would always reduce the disfavored class to zero. Only legally-neutral characteristics can be used.

So normally to decide who is in and who is out, we would first determine the "legally-neutral characteristics" of the favored class and then use those as sort of a common denominator to define a matching class. Here to do that, seemingly our first resort would be to the exemption statute to determine the legally-neutral characteristics by which the favored state class is defined, seemingly the same approach the state is taking here with its host of issues.

(b) *Why the pensioners have standing despite any host of differences.*

But here, as we shall see, that sort of methodology is unnecessary, because any sort of criterion-by-criterion comparison (or any other type of factual comparison) of state and federal pensioners is irrelevant. For under federal law, which reigns supreme in the legality of state taxation of those who work for or deal with the federal

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[34] The term "similarly-situated", however, is usually reserved to describe a class's internal commonality.

government,[35] federal pensioners are deemed to stand in the same relation to the state's pension tax exemption that the state pensioners here favored do. As we will see, federal law deems both these groups "similarly situated" *as a matter of law,* for purposes of those privileges at least.

To understand precisely why, we need to digress a bit into the history of intergovernmental immunity and its relationship to a 1939 federal statute involved in this case.

The doctrine of intergovernmental immunity originated in *McCulloch v. Maryland,*[36] where Chief Justice Marshall held that Maryland couldn't tax the Bank of the United States, because to do so would interfere with the exercise of legitimate federal powers. Before 1938, the immunity was thought a flat prohibition against any taxing of one sovereign by the other and thus a prohibition against the federal government taxing the salaries of state employees,[37] and against the states taxing the salaries of federal employees.[38]

However, in 1938, the court changed course, holding that the federal government could levy *non-discriminatory* taxes on the incomes of most state employees.[39] Then in 1939, in *Graves v. New York ex rel. O'Keefe,*[40] the court completed the change of course by holding that states could levy *non-discriminatory* taxes on the salary of an employee of a government corporation without violating intergovernmental immunity.

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[35] The Supremacy Clause, ART. VI, U.S. CONSTITUTION.

[36] 4 Wheat. 316 (1819).

[37] *Collector v. Day,* 11 Wall 113, 124-28 (1871).

[38] *Dobbins v. Commissioners of Erie County,* 16 Pet. 435 (1842).

[39] *Helvering v. Gebhardt,* 304 U.S. 405 (1938).

[40] 306 U.S. 466, 486-87 (1939).

Also in 1939, shortly after *Graves*, Congress created a federal statute that provided that states could tax federal employees "if the taxation does not discriminate against the . . . employee because of the source of the pay or compensation." [41]

Then in 1960, in another intergovernmental immunity case where a lessee of the federal government was subject to a county property tax, but lessees of state and municipal realty were not, the court voided the tax, stating the non-discrimination principle of intergovernmental immunity requires "that the state treat those who deal with the [federal] government *as well as* it treats those with whom it deals itself." [42]

Finally in 1989, in *Davis v. Michigan Department of Treasury* [43] the court construed the non-discrimination clause of the 1939 statute quoted above as codifying the residual non-discrimination principle of intergovernmental immunity, declaring that "the scope of the immunity granted or retained by [the 1939 statute's] non-discrimination clause is to be determined by reference to the constitutional doctrine." The court went on to hold that Davis, a federal pensioner, was by virtue of the 1939 statute entitled to the same exemption that Michigan state and local employees were allowed by Michigan law.

What is the upshot of all this? First, as the result in *Davis* makes clear, federal pensioners are included in the class of those who "deal" with the federal government.

Second, the non-discrimination component of the 1939 statute, as it applies to taxation of federal pensioners, can only be read as mandating that in its taxation, a

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[41] 4 U.S.C. § 111.

[42] *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 385 (1960) (emphasis added).

[43] 489 U.S. 803, 814 (1989).

state must treat federal pensioners *as well as* it treats its own pensioners; and, as it applies to taxation of state pensioners, the federal government must in its taxation treat state pensioners *as well as* it treats its own federal pensioners.

So to put the substantive "as well as" principle in terms of pension tax discrimination standing: as to a pension tax exemption a state chooses to give its state pensioners, federal pensioners "stand in the same relation" or status as the state pensioners; and as to a corresponding federal exemption, state pensioners "stand in the same relation or status" as the federal pensioners.

Or putting it in still other standing terms; each group (and each's sovereign, for that matter) has a federally-declared "community of interest" (or "community of immunity") in being free from any discriminatory taxation at the hands of the other's sovereign.[44]

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[44] Though federal law implicitly recognizes that both groups are separate communities, it nonetheless treats them as one common community with a joint, co-equal interest in discrimination-free "cross-community" taxation, rather like a compact or treaty between the two communities.

The reason for this "community of immunity" is fairly obvious. It exists to insure that both sovereigns can operate freely within their respective spheres in our system of dual federalism. From the standpoint of the federal government, if a state discriminates in its taxation against federal employees and in favor of its own, the federal government, if nothing else, will have great difficulty in persuading its employees to move to or remain in that state. Similarly, if the federal government discriminates in its taxation against state employees and in favor of its own, the states will have great difficulties in attracting and keeping employees. Those employees will be drawn into the private sector or into the federal sector.

Moreover, such tax discrimination, as trade wars are set off by tariffs, can detonate retaliatory tax wars. If, for example, we assume that the alleged discrimination in this case is real, one could imagine the possibility of the threat of federal retaliation

From that community of interest or parity of relation, whatever we want to call it, it inescapably follows that federal pensioners are "similarly-situated" to the state pensioners in respect to the state's pension tax privileges. For to say, as the federal statute in effect does, that there is a parity of relation or stature or a community of interest between the two groups is the equivalent of saying that federal pensioners have been deemed to possess the same critical, "privilege-entitling" characteristics as possessed by the state pensioners—just another way of saying that federal pensioners as a class are sufficiently similar to state pensioners to justify mandating for them the same state pension tax treatment state pensioners as a class enjoy.[45]

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whereby the all state pensioners (or perhaps just the exempt state pensioners) would be required to pay some sort of higher federal tax designed to equalize the overall tax burden of state pensioners and federal pensioners, or perhaps even to increase the state pensioners' overall burden. Or perhaps the retaliation would more likely occur in some other more direct form, for example, through a reduction in "federal dollars" flowing into the state. The common immunity helps prevent these sort of things.

Note that intergovernmental immunity doesn't prevent a sovereign from discriminating against itself (or its employees), as the federal government does in taxing income from federal bonds, while not taxing income from state bonds, and as the state may have done here in respect to some of its own pensioners. *See* Comment, 38 Geo. L. J. 488, 490 (1950).

[45] *Query*: Even if the federal statute of "deemed tax similarity" didn't exist, would the deemed similarity exist under state law? Under the present version of the exemption statute at issue here, § 71.05(1)(a) enacted in 1989, the law lumps favored state and federal pensioners together, giving each the same exemption with respect to their pensions. The revised state statute creates it own "host of issues". Does the statute constitute the state's own declaration that both groups and the members are similarly-situated irrespective of actual differences? Would it be an answer to say that the state's recognition of this legal homogeneity is effective only in 1989 and years after? Is legislative-declared homogeneity prospective only? Is there any reasonable distinction between the federal pensioner on December 31, 1988, and January 1, 1989? Does a non-homogeneous group become homogeneous through the

However, to say that the federal pensioners are, as a class, "similarly-situated" to state pensioners as a class creates in this case an apparent conundrum arising out of the fact that the state when enacting the exemption split the universe of state pensioners into one favored sub-class and one disfavored: can federal pensioners be similarly-situated to both the favored and disfavored groups and still have standing?

Yes. Although the federal pensioners are similarly-situated to both groups of state pensioners, their similarity to the disfavored state group is not relevant, because in discrimination cases, the similarity we search for is similarity between the plaintiffs and the favored group, not similarity betwen the plaintiffs and another disfavored group.

The second question that arises from the split is, "Do we need to decide whether the federal pensioners are "more similarly-situated" to the disfavored state pensioners than to the favored state pensioners, and, if so, wouldn't that disqualify the federal pensioners? No, for two reasons.

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passage of time? And what was the effect, if any, of the secretary of revenue's "concession" in 1989 that the statute, in its prior form, discriminated against federal pensioners?

Query further: Does the history of the state's tax treatment of federal and state pensioners have a bearing on the question. From the materials we have, it would appear that from 1939-1963, all federal pensions and the types of state pensions involved here were exempt. In 1964 and 1965, all federal pensions continued to be exempt, but only "vintage pre-1964" state pensions remained exempt. From 1966-1988, no federal pensions were exempt, but the pre-1964 vintage state pensions remained exempt. In 1989, some federal pensions (pre-1964 vintage) became exempt. So we have the state for the first 26 years treating for tax purposes the type of federal and state pensioners involved here as a homogeneous group, then a hiatus of 22 years where they were non-homogeneous, and now a new period of 4 years where they are treated as being once again homogeneous. Can two groups first be homogeneous, then disparate, and then homogeneous again all within a space of less than 50 years?

First, the possibility that the federal pensioners and the disfavored state group might have something more in common than the federal pensioners and the favored group have is also irrelevant, for once again, the class definition inquiry is directed toward things in common the federal group has with the favored state group; and its potentially-greater commonality with the disfavored state group is irrelevant.

Second, and in any event, it is impossible to say that federal pensioners have more in common with disfavored state pensioners than they do with favored state pensioners. The federal statute, as we have seen, shows us that members of both groups have only one legally-critical characteristic in common—their status as government pensioners. There is no other basis of comparison—government pensioner status is the *sole* criterion of commonality. So it cannot be said that any federal pensioner has any more in common with any one set of state pensioners than he does with another. The commonality of "government pensioner" is exactly the same as to both sets. In other words, the "deemed reality" is that federal pensioner A has as much in common with favored state pensioner B as he does with disfavored state pensioner C.[46]

So it is we here conclude that the federal pensioners we certified are similarly-situated to the favored state

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[46] Thus, to the objection that here only *some* state pensioners were favored and some harmed and therefore only some federal pensioners ought to have standing, we answer that the objection is not a proper objection to standing. Standing deals with who is eligible to recover if discrimination has occurred. Standing is a question of "whether a litigant is a proper party to fight a lawsuit, not whether the issue itself is justiciable." *Black's Law Dictionary*, 5th Ed. at 1260-61. As we have seen, the "partial discrimination" facet of this probelm goes (if it goes to anything) to whether the alleged discrimination is actionable or merely *de minimus* in degree. *See* pp. 15-17, *supra*.

pensioners as a matter of law, irrespective of any actual differences between them as groups or individuals.[47]

Flowing automatically from this parity of relation, community of interest, and deemed similarity is the federal pensioners' standing to sue. Thus all federal pensioners harmed by state's discriminatory pension taxation have standing to sue.[48]

In sum, where, as here, it is alleged that a state taxing statute discriminates against federal pensioners in favor of some select state pensioners, for standing purposes no "actual" comparison of the federal pensioners and the selected state pensioners need be made, because each federal pensioner is deemed by federal law to have the requisite common attributes with, and be similarly-situated to, the favored state pensioners. Here commonality is presumed, and the federal pensioners can proceed as a class to stand or fall, all for one and one for all, as a group.

Consequently, we need not reach the state's host of issues, the differentials the state says exist—1963 nonresidence, lack of 1963 Wisconsin filing status, job differences, and so on. All fall by the wayside, because each wrongly presumes that each federal pensioner must demonstrate an "actual" similarity, when in fact that similarity has already been constructed by law." [49]

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[47] *Davis* seems to confirm the point that actual differences don't matter. Nowhere did the court make any effort to compare the winning pensioner's life circumstances, his job, or his pension with Michigan pensioners, despite the fact that there must have been differences. Moreover, the court actually characterized the state and federal pensioners as "similar groups of retirees". *Davis*, 489 U.S. at 816. The strong implication is that actual disparities were thought irrelevant, and the two groups regarded as class clones for purposes of state tax discrimination.

[48] As would all state pensioners if the tables were turned.

[49] Even if we measure the state's host of issues divisions of the federal class solely against the criteria of the Wisconsin exemption

In closing the host of issues discussion, we note that the above analysis reflects what we think is merely an intuitive truth, namely that the federal pensioners are

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statute, without regard to the federal-state tax parity created by federal law, we see that the divisions lack any sort of "internal statutory consistency". The analysis below shows that under the statute itself, the only "internal common denominator" of eligibility is membership in a government pension as of December 31, 1963, precisely how the federal class is here defined.

The exemption statute, § 71.05(1)(a) (1987-88), exempted:

> "All payments received from the employee's retirement system of the city of Milwaukee, Milwaukee county employees' retirement system, sheriff's annuity and benefit fund of Milwaukee county, police officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public employee trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963, or was retired from any of the systems or funds as of December 31, 1963".

Let's consider the state's 12-host of issues (really, a baker's dozen) to see whether the statute intrinsically allows any of the exclusions suggested or whether any of the other points therein have merit.

1. The 1963 Wisconsin income tax filing obligation exclusion is not a basis for exclusion of federal pensioners. A state pensioner who resided in Wisconsin until 12/31/62, moved to Arizona on that date, but returned to Wisconsin on 1/1/64 or later, would not have had a 1963 Wisconsin filing obligation. Yet in 1964 and later years, he could rightly exempt his pension income on the grounds that he was a member as of 12/31/63. The exemption covers more pensioners than those with a 12/31/63 filing status.

Nor, for the same reason, can 12/31/63 Wisconsin state residence be a basis. One, we suppose, might argue that *pre*-12/31/63 residence was an implied requirement to have been a state employee and ultimately a pensioner. However, we find no authority for that. In fact, state statutes at the time seemed to have allowed nonresidents to work in state university jobs. *See* § 42.35 (1963)

what we might call a "self-defining group". We use this term to convey the idea that in certain categorical discrimination cases (those where a state confers a benefit

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(allowing "visiting professors" membership if their employment was longer than one year). Included are state teachers residing in other locales.

2. and 4. 1963 Milwaukee city or county residence can't be an exclusion, for the exemption covers a class far broader than residents of Milwaukee city or county.

3., 5., and 6. The incomparability of federal and state pensioners' former jobs is also an internally impossible distinction, for the state and local jobs of those allowed the exemption have little or nothing in common with each other than public service. (Policemen and teachers? Firemen and office workers?)

7. Possible differences in types of state and federal retirement programs fails for the reason that the exemption uses the generic "retirement system", a term broad enough to include the federal pensioners' programs.

8. That state employees may have derived their pension rights from public contract rights is no basis. Apart from the fact that public contract rights is probably just how federal pensioners derived their pension rights, we need recognize that employee pension rights don't really originate from a piece of paper called a contract, but ultimately from the pensioner's actual employment.

9. The assertion that the federal class is too broad because it includes constructive members, while on the surface a plausible basis, presupposes that exempted state pensioners who were only constructive members are not eligible for the exemption, a proposition that is not supported with any argument or evidence. Moreover, in law a truly constructive member is one who acquires the character of actual member notwithstanding the lack of formality in securing his membership, and his rights would be the same as one who had properly formalized his membership.

10. and 11. Whether the exemption for state and local pensioners "was truy intended to account for differences in retirement benefits" is an issue that goes to the merits, an issue whether the discrimination is illegal source discrimination, *see* p. 8, *supra*, not an issue of class composition.

12. Whether *Davis* "announces a new principle of law whose application is prospective only?' 'is not an issue that goes to class composition, but to whether the class, if successful, can recover refunds for years before *Davis* was announced.

for one group to the exclusion of a protected group), there is no occasion to compare the characteristics of the disfavored class with those of the favored class, because the disfavored class is defined by the "inherent legal status" it has to complain of the discrimination involved.

To understand what we mean, consider a categorical sex discrimination case brought by a class of women suing over a statute that gave a tax exemption to men only. In a case such as that, only females have the "inherent legal status" to claim discrimination. So the class would be "self-defined" to include all females.[50] (To be sure, the definition would have to exclude any women who had not been harmed by the discrimination, i.e., those who had no tax liability while the statute was in force).

Or consider a categorical race discrimination case, brought by a class of blacks suing over a statute that gave a tax exemption to all non-blacks. The class would once again be self-defining: all blacks except those who had no tax liability while the statute was in force.[51]

It is the same here. An intergovernmental immunity tax discrimination case is a categorical discrimination case,[52] and here the federal pensioners are a self-defining

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13. "[A]ctuarial issues involved in setting such Milwaukee and state teacher retirement benefit levels" was never developed, so we're not sure exactly what was meant. "Actuarial" refers to teacher's life expectancies, we guess. Although today a teacher's life expectancy may be on a par with a policemen assigned to a crack house neighborhood, or a Vietnam helicopter pilot, we fail to grasp how a teacher's short life expectancy is a statutory criterion. Tamer occupations, such as civil servants, are included.

[50] Plus those claiming through them, i.e., relatives including males.

[51] In both the sex and race discrimination examples, if the illegal exemption hadn't been repealed or conformed to include all, even those females and blacks without previous tax liability could have standing to sue for prospective discrimination.

[52] One might perhaps argue that the alleged discrimination here is not categorical in that only *some* state pensioners are favored. However, although it is not categorical in the sense that the cate-

class in the sense that their federal pensioner status itself is the operative class definition. (Once again, the definition has to exclude any federal pensioners not harmed by the discrimination—those with no tax liability while the statute was in force).

Consequently here, the *only* disfavored group characteristic that counts is the characteristic of "federal pensioner status". So in defining the eligible class, the federal pensioners' eligibility to complain turns entirely on their legal status as federal pensioners, not on what factual similarities exist between them and the select state pensioners.

(2) *The windfall objection*

The state's "unfair windfall" objection appears to be that because some, possibly even most, state pensioners have to pay taxes on their pensions, and the discrimination of the statute favors only a relative few, many of the federal pensioners here could win an "unfair windfall" at the expense of disfavored state pensioners. Therefore, to avoid the windfall, the class of federal pensioners must be pared and recomposed somehow to make it a better match with the favored state pensioners.[53]

At its core, the unfair windfall objection is based upon the implicit premise that disfavored state pensioners *stand in an equal or closer relation to,* and have as much or more in common with, the favored state pensioners than

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gorization favors *all* state pensioners, it is a categorical discrimination *against* all federal pensioners.

[53] Note also that the windfall objection gives off the whiff of the argument that because the discrimination is partial and favors only a relative few and discriminates against many, the discrimination isn't serious enough to be actionable. Again that, if anything, is a merits question. *See* pp. 15-17, *supra*. But again, because we are not at the merits, but only at class definition, we ignore any such argument.

do the more remote federal pensioners [54]—more in common perhaps, because both the favored and the disfavored state pensioners are, after all, pensioners whose pensions derive from *state or state subdivision employment*. Therefore, because there are disfavored state pensioners equally situated or more similarly-situated to the favored group and yet out of luck, the federal pensioners ought also be out of luck and be excluded from the class.[55]

Although we might agree that disfavored state pensioners stand in a closer "factual relation" to the favored state pensioners, the point here goes nowhere; for the federal pensioners' own established legal standing is not defeated or limited by the fact that there are disfavored state pensioners with perhaps closer "factual standing".

The possibility that the federal pensioners here may get a windfall that the ineligible state pensioners should also receive as a matter of greater factual or moral equivalence, has no bearing on how we go about defining the class of federal pensioners allegedly wronged or, for that matter, on whether whatever federal pensioners make up a proper class ought to be allowed to recover.

To see why, let us put the matter in more stark terms. Consider a race discrimination case brought by a black representative of a proposed group of blacks suing for

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[54] An "unfair" windfall argument, such as the one here, is by nature an argument that A, who receives a benefit, shouldn't be allowed to keep it if B doesn't get it and is equally or more deserving of it.

[55] In analyzing the windfall argument, we will ignore our feeling that it seems a just a bit disingenuous in emphasizing the plight of non-exempt state pensioners. If the state really felt that allowing the federal pensioners to proceed here would give them an unfair windfall, why did the state in 1989 decide to give the federal pensioners an exemption that the same state pensioners we are talking about here weren't and aren't allowed. Didn't that change perpetuate the same sort of windfall the state is complaining of here?

the race discrimination fostered by a statute that gave a tax exemption only to white Irish. Reasoning that white Scots don't get the exemption, the state contends that all black Scots, for example, must be excluded from the class of blacks.

The exclusion of black Scots is proper, the state argues, because non-exempt white Scots, being white and being from the same island and continent, stand in a closer relation (indeed a racially-identical relation) to white Irish than black Scots do, black Scots having only the same geography in common with white Irish and not race. Thus to avoid giving black Scots an "unfair windfall" that the more "closely connected" white Scots do not get, the state claims that black Scots must be excluded from the plaintiff class. Would the reasoning be sound?

No. The argument's flaw is that it says, in effect, that for blacks to qualify as plaintiffs in the race discrimination suit, the blacks must not only be black, but must also show that there are no other equally-similar or more similar victims of any other type of discrimination (illegal or legal) the statute brings to bear.

Thus the argument creates an additional requirement of standing, sort of a "no-other-similar-or-more-closely-related-victim" requirement that would disqualify all black Scotsmen (and indeed all other non-Irish blacks)—sort of an "only-Irish-blacks-need-apply" type standard. We know of no law or logic to support such a result or its underlying principle that one's otherwise established standing is defeated by the fact that there are equally-deserving or more deserving victims.[56]

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[56] *Query*: Doesn't the no-windfall principle also create the following possible paradox: If a state wanted to enact a statute that illegally discriminated, then the drafters would be "smart" to load it up with as many forms of discrimination possible, for the *more*

The example and the absurdity we think it demonstrates correlates to the case before us. Just as the black Scot has standing to assert a cause of action for the state's race discrimination in favor of the white Irish, irrespective of the fact that the "more similarly-situated" white Scot is also a victim of the statute, so the federal pensioner has standing to assert a cause for state tax discrimination in favor of state pensioners, irrespective of the fact that more similarly-situated state pensioners may also be victims.

So we see that the fact that some state pensioners may suffer a form of discrimination at the hands of the exemption doesn't deprive federal pensioners of their standing to sue. One does not lose standing just because others suffering from discrimination may have been victimized and no standing in the suit.[57] In discrimination cases, standing

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illegal types of discrimination the statute contains, the *fewer* people there are who have standing to complain.

The paradox can be illustrated by adding another layer of illegal discrimination onto the white Irish statute in text. If we were to add sex discrimination by changing the statute to allow only white Irish *males* to claim the exemption, and again postulate a race discrimination case brought by a group of blacks, the state's "no windfall" argument would postulate that because white Irish females don't get the exemption, all *Black* Irish women must be excluded from the class, the reason being that *white* Irish women, who have more in common with white Irish men than do black Irish women (i.e. their race), can't complain of race discrimination.

We can see that the apparent effect of adding gender discrimination on top of race and nationality discrimination is to exclude even more blacks from standing in the race discrimination case. In the textual example, all non-Irish blacks of both genders were excluded. With the expanded example, all non-Irish blacks of both genders remain excluded *and* in addition all black Irish women are excluded.

Would the exclusionary phenomenon of the paradox expand with more and more types of illegal discrimination added, perhaps to the point that a race discrimination suit was an impossibility?

[57] Unlike the federal pensioners, disfavored state pensioners have no legal standing to bring an *inter*governmental tax immunity action against their own state government. Intergovernmental

arises from one's own circumstances in relation to the beneficiaries of the discrimination, not one's circumstances in relation to those of others.[58]

Therefore although some federal pensioners may win an "unfair windfall" in the sense that they would be getting something some state pensioners, suffering perhaps greater comparative discrimination, might not be entitled to receive, that is no legal reason for excluding any federal pensioners from the class.

C. *Was the class we certified the proper class?*

It remains for us to decide whether the class otherwise meets the criteria for being allowed to proceed as a class.

There are three other prerequisites for a class action: a common or general interest shared by all members of the class; the main party must be a fair representative for

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immunity, so far as we know, *lies* only in favor of federal pensioners who allege discrimination in state taxation, and state pensioners who allege discrimination in federal taxation; and not in favor of state pensioners alleging discrimination in state taxation or of federal pensioners alleging discrimination in federal taxation.

[58] As one other example of the "logic" of the state's windfall objection, consider an interstate commerce clause discrimination action brought by hamburger chains doing some business in Wisconsin, but also engaged in interstate commerce, for discrimination in a state income tax exemption given only to *intra*state hamburger stands located in Milwaukee county. The state points out that there are other intrastate hamburger stands that don't get the exemption—stands that stand in the same or closer relation to the exempted Milwaukee county stands; and argues that because those stands suffer equally from the discrimination, the interstate chains can have no standing to sue, because to give them standing would be to give to them a windfall.

The argument would fail. The fact that the more similarly-situated intrastate stands suffer the same economic harm at the hands of thier own home state has no bearing on the standing of the interstate chains.

the interests involved; and it must be impracticable to bring all the parties before the trier of fact.[59]

All three are established. There is a commonality of interest shared by all federal pensioners seeking certification. Each is a pre-1964 vintage pensioner seeking a refund of the 1984-88 Wisconsin taxes paid on their federal pensions, allegedly in violation of federal statute and intergovernmental immunity. Thus they each have causes of action based on common status, common facts, common legal theory, and common relief.[60]

The main party, Mr. Hogan, does fairly represent the group. There is no conflict between Mr. Hogan's interests and those of other members of the class. Mr. Hogan is a former FBI agent who was in charge of the Bureau's Milwaukee office from 1975-1979, and has other impressive qualities and credentials, the details of which are in the record.[61] Nor is there any question about the abilities and credentials of the proposed lead counsel for the class, Mr. Duffy, the details of which also appear in the record.[62]

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[59] *Mercury Records Productions v. Economic Consultant, Inc.*, 91 Wis. 2d 482, 490 (Ct. App. 1979).

[60] If we were to accept the state's invitation to try to subdivide the federal group into various factions within the group, would that subdivision itself create federal statutory violations? On the surface at least, the 1939 federal statute we spoke of earlier, treats federal pensioners as a homogeneous group for state tax purposes. Individual differences among them are seemingly irrelevant. Therefore, if we were to start splitting out federal pensioners on the basis of residence or filing status, type of job, or what have you, as the state invites us to do, and giving some federal pensioners an exemption that other federal pensioners didn't have, wouldn't we be breaking that "internal" unity, and perhaps creating actionable discriminations within that group?

[61] Affidavit of Mr. Hogan.

[62] Affidavit of Mr. Duffy.

We also hold that it would be (to say the least) impracticable (and indeed unnecessary, as we noted earlier) to bring all 25,000 individuals that make up the class into individual commission hearings or one mass hearing. As taxpayers point out:

> "Assuming this commission had no other cases, sat 50 weeks a year, for 5 days a week, for 8 hours a day, took no breaks, and limited each case to 20 minutes, it could hear with luck 6,000 cases a year. * * * [A]t best, it would take over 4 years for such a process. In the meantime the other important work of the Commission . . . would have to be halted."

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Finally, to the extent it matters,[63] we also adopt as our own, *mutatis mutandis,* the class certification findings and conclusions Judge Jones made in the earlier case, as they have been placed in the record here.[64]

III.

ORDER

The state's petition for rehearing is denied. The class certification order, modified to exclude the class notice provisions, will be signed upon receipt of a revised order that Mr. Duffy shall submit forthwith. A scheduling conference for the purpose of determining the parties' positions on the manner and timing of class notice and for the purpose of scheduling deadlines for further submissions on taxpayers' pending motion for summary judgment is set for March 1, 1993, at 9:30 a.m., by telephone.

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[63] *See* n. 2, *supra.*

[64] ¶¶ 13, 14, and 15 of his order in *Hogan I,* found at Pet. Memo. in opposition to Resp. Motion to Dismiss Class Claims and in Support of Pet. Motion, at 3-4.

Dated at Mequon, Wisconsin, February 16, 1993.

(Not Participating)
MARK E. MUSOLF

(Approved)
THOMAS R. TIMKEN

/s/ Douglass H. Bartley
DOUGLASS H. BARTLEY

APPENDIX M

WISCONSIN TAX APPEALS COMMISSION

Docket No. 91-I-386

J. GERARD and DELORES M. HOGAN, *et al.*,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

RULING AND ORDER ON MOTIONS

Appearances: For petitioners: Eugene O. Duffy, Esq. For respondent: Kevin B. Cronin, Esq.

Bartley, Commissioner, joined by Timken, Commissioner:

I.

ISSUES

Issue 1. *Can commission rulings on refund claims ever be "prospective"?* Where taxpayers on April 17, 1989, filed a refund claim for 1988, and on April 16, 1990, filed an amended refund claim for 1982-88, each of which was grounded on the argument that Wisconsin, like Michigan in *Davis v. Michigan Dep't of Treasury*,[1] had wrongfully and unconstitutionally collected income taxes on

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[1] 489 U.S. 803 (1989). *Davis* struck down a statutory scheme which exempted pension proceeds paid to former state employees, but taxed the pensions of former federal employees. The Supreme Court held that the scheme violated a federal statute and the doctrine of intergovernmental immunity, a doctrine of constitutional dimensions.

taxpayer-husband's federal retirement benefits while simultaneously exempting the retirement benefits of certain retired state and government local employees,[2] would a commission decision upholding the taxpayers' argument require the state to issue refunds for all the tax years covered and preserved by the refund claim, or would such a decision affect only tax periods after the U.S. Supreme Court announced *Davis* on March 28, 1989, thus defeating the pre-1989 refund claims involved here?

Issue 2. *Can the commission hear class action tax claims*? Where taxpayers' amended refund claim added as additional claimants all members of the class (the *et al* in the caption above) that they had been certified to represent in separate court litigation [3] and which claim was signed by the lawyer that the court on June 15, 1989, authorized to represent the class, and where the state denied both taxpayers' and the class claim on the grounds that the law made no provision for class tax refund claims, does the commission have subject matter jurisdiction to entertain the class claims?

II.

FINDINGS OF FACT

The material facts are given in the statement above.

III.

CONCLUSIONS OF LAW

A. *Can commission rulings on refund claims ever be "prospective"*?

What we have loosely called the "prospectivity" question arises out of the state's motion seeking reconsidera-

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[2] § 71.05(1)(a), Wis. Stats. (1987-88). Later the state acted to exempt federal pensioners as well. *See* 1989-90 statutory version.

[3] *Hogan et al v. Musolf et al*, Case No. 89-CV-2007 (Dane Co. Cir. Ct.).

tion of a portion of an earlier ruling in which we stated that the issue in this case "is not the retroactivity or prospectivity of any commission or court ruling that taxes have been unconstitutionally collected, but whether those now making those claims have preserved them." [4] We went on to say that the commission decision that the taxes were wrongly collected will "have its own inherent 'retroactive effect'—enabling all who have preserved their claims for refund claims to recover, even for taxes for years long gone by." [5]

The state argues our "inherent retroactivity" statement was unnecessary to the decision and, in any event, that we were premature in making it, because it served to foreclose the state's possibly sustainable "prospectivity defense," the validity of which is the precise subject of a case pending at the U.S. Supreme Court.[6]

We need not decide whether our statement was necessary or not, for we today hold that it was legally correct as a matter of state law, irrespective of the outcome of the pending Supreme Court case. As a matter of state law, a commission decision upholding a refund claim (or an assessment claim for that matter) is always "retroactive" and never prospective.

Under Wisconsin statute law, the only requirements a taxpayer need meet to prove (and collect on) a refund claim is that the claim be timely, in proper form, and meritorious.[7] Nowhere in statutory tax procedure is there

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[4] *Hogan et al v. Wisconsin Department of Revenue et al*, ¶ 203-336 CCH Wis. Tax Reptr. (WTAC 1992) (decision on recusal motion).

[5] *Id.*

[6] *Harper v. Virginia Dep't of Taxation*, 410 S.E.2d 629 (Va. 1991), petition for cert. granted, 112 S. Ct. 1984 (1992).

[7] § 71.75(6), Wis. Stats. (1989-90) provides, "Every claim for refund . . . of income [taxes] . . . shall be filed with the department

any additional condition on taxpayer's right to collect an otherwise collectible refund. The statutes thus place no prospectively obstacle in the winning refund claimant's path.

Nor does the common law. The original Wisconsin Constitution incorporated the common law, providing: "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature." [8] Thus whatever common law was in force at the time the constitution was adopted remains in force today except to the extent that the legislature subsequently superseded it by statute or except to the extent the Constitution itself repeals it.

One of the principles of common law that existed in 1847 when the constitution was adopted* was the doctrine expressed in the maxim, *"Novum judicium non dat novum jus, sed declarat antiquum; quia judicium est juris dictum et per judicium jus est noviter revelatum quod diu fuit velatum,"* meaning, "A new adjudication does not make a new law, but declares the old; because adjudication is the utterance of the law, and by adjudication the law is newly revealed which was for a long time hidden." [9]

Here the operation of the maxim is obvious. No Wisconsin court or tax appeals decision is ever prospective—

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of revenue and signed by the person . . . who filed the return on which the claim is based and shall set forth specifically and explain in detail the reasons for and the basis of the claim."

[8] ART. 14, § 13, WIS. CONSTITUTION.

* We do not suggest that 1847 was a "frost line" freezing out of our law any post-1847 evolution. The common law is a system of building blocks with each decision having prior expositions as its foundation. Therefore, post-1847 exposition is merely extention or refinement of pre-existing, core principal.

[9] *Black's Law Dictionary*, 5th Ed. at 960.

no matter how long its revelation of law was delayed, no matter how clandestine the existence of its legal underpinnings, no matter how radical its departure from the conventional wisdom of what the law is, no matter how novel its application of embedded legal principle, no matter how surprised or damaged the losing litigant might be.[10] Wisconsin courts and commissions are not lawgivers —they are law seekers, explorers whose "discoveries" are made within the confines our common law continuum, seekers whose judgments must "draw inspiration from consecrated principle," as Justice Cardozo put it.[11] Court and commission decisions are revelations of existing law, not creations of new law.

So we see that Wisconsin common law clearly negates the idea of adjudicatory prospectivity. And when we stop to think about why prospectivity was rejected by the common law courts of England and derivatively by the framers of the Wisconsin Constitution, the reasons abound.

Let us consider what prospectivity would mean in the context of tax refund claims and tax litigation in general.

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[10] We are aware that "prospectivity" (or perhaps more accurately, "limited retroactivity") has gained a foothold in federal constitutional adjudication. *See*, e.g., *Johnson v. New Jersey*, 384 U.S. 719 (1966) (holding that *Miranda v. Arizona*, 384 U.S. 436 (1966) affected only those cases in which the trial began after the date of that decision). *Miranda*'s enactment of new code of police guidelines and procedures was perhaps the Supreme Court's most notable legislative escapade and threatened the admissability of countless prior confessions. *Miranda* thus begat *Johnson*. The *Johnson* ruling that *Miranda* had only limited retroactive effect saved many confessions, but also was the Court's unintended admission that *Miranda* was indeed legislation that like other legislation, establishes rules for the future not the past.

But notwithstanding the Court's occasional flirtations with prospectivity to clean up its own messes, in Wisconsin we are bound to follow the common law rule against adjudicatory prospectivity.

[11] *Cardozo on the Law*, Legal Classics Library, at 141.

Every tax refund claim involves the claim that a tax has been illegally collected; and every refund claim we sustain results in an order requiring the repayment of taxes illegally collected. Virtually every tax appeals case, to some degree or other, presents an "unsettled question," and nearly every commission decision adds at least some flesh (we would like to think at least) to the bones of our tax law.[12]

Obviously we can't adopt a prospectivity rule in all refund cases, for that universal rule would mean that the successful claimant could *never* collect his refund, the reason being that the decision always comes long (some would say too long) after the tax years involved have passed. Therefore, any prospectivity rule would have to call for *selective* prospectivity.

By what criteria, then, could we decide whether a particular decision should be prospective only? Would prospectivity be based on the "relative novelty" of our holding? If so, how would we go about discerning whether our decision is "too novel" to be "retroactive"? Should the standard be, "Slightly more than utterly without any novelty whatsoever?" Somewhat novel? More novel than not? Clearly and convincingly novel? Novel beyond a reasonable doubt? Novel beyond any doubt whatsoever? And who would have the burden of proof?

Even if we could agree on a general standard, we suspect the whole exercise would be rather like trying to nail Jello to a wall. Apart from the fact that the prospectivity question would add another layer of proceedings onto an already lengthy and expensive process, as the parties cavil over the ninth part of the hair of novelty, we cannot conceive of a sound basis on which to decide whether the novelty presented surpasses whatever standard we have established. What is the definition of "novel"

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[12] The mean-spirited wag would say, "adds more lard to our already overbloated mass of tax law."

itself. Does it mean that the theory has never been hinted at anywhere in our law? Never applied in tax cases? Never applied in tax refund cases? Never discussed in law reviews? Or what?

The ultimate impact of these novelty searches would be to drug our already overstressed legal system with yet another stultifying dose of indeterminacy. Our system is already at least partially paralyzed by the unpredictability, the arbitrariness that comes from leaving too many questions to the whim and caprice of judges and commissioners. The novelty injection would, we think, put the system in an oxygen tent if not pushing it over the brink.

Apart from system stress, the unpredictability of the novelty question would spike at least some meritorious claims. For those holding "novel" but winnable refund claims, the prospect of a prospective only, Pyrrhic victory would probably chill the filing of the claim. And the tax appeals commission would become sort of a Kafkaesque moot court, where the winning taxpayer is awarded argumentative victory, only to be told that his argument was too incisive to win economic victory. The prospect of academic victory would be chilling enough. But perhaps even more chilling would be the fact that our hypothetical winner would also have obtained the eleemosynary honor of having donated the cost of his lawyer's or CPA's services to the cause of law reform.

There's another major problem beyond the chilling effect. Were we to adopt a prospectivity rule in refund cases, wouldn't principles of mutuality require us to apply it in assessment cases as well? Suppose we have an assessment case where in 1992 we uphold a tax assessment for tax year 1990 on grounds never before articulated. Suppose further the taxpayer then rightly argues, in the post-decision "prospectivity proceedings", that the ruling is so novel as to step over whatever novelty threshold we

had endorsed. Wouldn't we have to tell the state something like, "Congratulations on your novel argument. But because it was so extraordinarily ingenious, you are barred from collecting the assessment." We suspect that our ruling wouldn't be the object of universal acclaim.

In sum, whenever, a refund or assessment claim "turns out" to be meritorious, it must be regarded as having been meritorious from its beginning, that is "inherently retroactive"; and the right to collect on the refund or assessment claim must be absolute and not in any way dependant on when the commission announces the decision or, for that matter, on when another tribunal announces a decision in an identical or similar case.

Accordingly here if taxpayers' refund claim turns out to be substantively meritorious, taxpayers will be entitled to a refund for all years still open in the refund claim. Thus, for example, if taxpayers' case is truly analogous to that in *Davis*, or if taxpayers can show that Wisconsin's taxing scheme violates other federal or state constitutional provisions, the refund claim will be granted "retroactively."

We don't see how the pending Supreme Court case on the *Davis* retroactivity question [18] necessarily would be fully dispositive of this case. True, if the Court should find that *Davis* is retroactive, and if *Davis* is analogous, that would automatically result in the allowance of all properly preserved claims here.

But if there were a *Davis*-is-prospective-only ruling, that ruling would not win the case for the state here. Even if *Davis* is prospective as a matter of federal "prospectivity law", under state law *Davis* would nevertheless be "retroactive". We reason that because our state constitution

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[18] *Harper*, n. 6, *supra*.

secures to legally-wronged litigants the right to a remedy,[14] and because *Davis* held that Michigan's taxation of federal pensions was a legal wrong, our constitution would mandate the refund remedy, irrespective of whether the federal courts have allowed the remedy or not, and irrespective of whether the wrong is a violation of federal law, state law, or both.[15]

B. *Can the commission hear class action tax claims?*

The state maintains that the commission has no jurisdiction over the class claims, because the refund claim statute requires that the individual claimant sign it himself.[16] Here the class claims fail, so the argument suggests, because only one of the 25,000 or so class of claimants actually signed a refund claim. The unspoken premise of the argument is that because the department of revenue can't act on any refund claims other than individually-signed ones, neither can the commission, a body whose "jurisdiction ultimately derives from what may properly be resolved in the department's tax redetermination process".[17]

The argument fails. As one might expect, our law, in this case statute law, explicitly restates the basic truism that agents can act for principals in meeting statutory requirements imposed on their principals: "If a statute requires an act to be done which may lawfully be done by an agent, such requirement includes all such acts when done by an authorized agent."[18] Thus, where there is a

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[14] ART. 1, § 9, provides: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character".

[15] ART. 1, § 9 requires remedies for "all . . . wrongs". "[A]ll . . . wrongs" include the universe of legal wrongs whether federal wrongs, state wrongs, or both.

[16] § 71.76(6), n. 7, *supra*.

[17] *Hogan et al v. Wisconsin Department of Revenue*, n. 4, *supra*.

[18] § 990.001(9).

statutory requirement imposed on a principal, such as the requirement that he file a signed tax refund claim, the requirement is statutorily satisfied if the principal-taxpayer's agent signs the claim.

As the court appointed, agent-attorney for the lead petitioners, taxpayers here, as well as for the class of federal retirees he was representing, Mr. Duffy was authorized to sign and file the amended refund claim on behalf of all of them; his single signature was, under the circumstances, the legal equivalent 25,000 [19] individual signatures; and the single combined claim he filed was the legal equivalent of 25,000 separate individual claims.

Consequently, we hold that the class refund claim was properly filed at the department of revenue, and that the department had jurisdiction to rule on the claim. It necessarily follows that the commission also has jurisdiction to rule on the class claim.

* * *

Several final points. Both the *Stege* case and the *Morissey* cases, previous commission decisions cited by the state as support for its argument that the commission can't hear class actions, are inapposite.[20] In both cases, the taxpayers failed to seek any sort of class relief at the department level.[21] It was only natural that the commission therefore declined to allow class actions at the commission level, the commission's jurisdiction, as we said above, being derivative.

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[19] 25,000 is the estimated size of the class.

[20] *Stege v. Wisconsin Department of Revenue*, CCH Wis. Tax Reptr. ¶ 201-729 (WTAC 1980). *Morrissey v. Wisconsin Department of Revenue*, Docket No. I-8189 (WTAC 1991).

[21] In *Morrissey*, an unpublished decision, no petition for redetermination had been filed with the department. *See* ¶ 10 of department's affidavit filed in that case.

Finally, the state argues that "the class became moot when the Wisconsin Supreme Court dismissed [the court litigation that preceded our review of this matter]". "This necessarily means", says the state, "that [the] supreme court erases the circuit court's [class certification] because the commission has not exercised its jurisdiction to first determine all questions of law in this case."

This too fails, for at the time the class refund claim was filed, Mr. Duffy was the authorized representative of the class, and even the Supreme Court's dismissal of the court litigation can't reverse that reality. To maintain that the dismissal of *Hogan* was tantamount to a *nunc pro tunc* "de-authorization" of Mr. Duffy is about as farfetched as contending that every time a litigant has a case dismissed, his lawyer is fired (ironically) *retroactively*, thereby rendering all the lawyer's prior representation void *ab initio*.

As tempting as such a proposition might be from the standpoint of giving disappointed litigants the right to recover "unauthorized" attorney's fees, there is, alas, no ground in law or logic for this sort of rule. Such a rule probably would make even a settlement and stitpulated dismissal itself void; for one could argue that once the dismissal were entered and the lawyer's authority to have acted in the case thereby voided back to the time his representation began, all the lawyer's acts, including the settlement and dismissal themselves, would also be void, raising the specter of the undismissable and perpetual case, the case that is reborn every time it dies.

IV.

ORDER

The state's motions for reconsideration and to dismiss the class action are overruled. Taxpayers' motion to strike the state's prospectivity defense is sustained. Taxpayers'

motion to certify here the class certified in *Hogan I* is sustained, and taxpayers' attorney shall submit the appropriate order delineating the class. Taxpayers' motion to strike the state's amended answer is moot and is therefore overruled. A scheduling conference for further proceedings is set for November 17, 1992, at 9:15 a.m.

Dated at Madison, Wisconsin, this 28th day of October, 1992.

(Not participating)
MARK E. MUSOLF

/s/ Thomas R. Timken
THOMAS R. TIMKEN

/s/ Douglass H. Bartley
DOUGLASS H. BARTLEY

APPENDIX N

WISCONSIN TAX APPEALS COMMISSION

Docket No. 91-I-386

J. GERARD and DELORES M. HOGAN, *et al.*,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

REVISED RULING AND ORDER ON MOTIONS

Bartley, Commissioner, joined by Timken, Commissioner:

As a prelude to confessing a mistake, Justice Jackson recounted the story of how Lord Westbury once rebuffed a barrister's reliance upon an erroneous opinion of his Lordship: "I can only say", said his Lordship, "that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." Apologizing in turn for his own error, Justice Jackson said of Lord Westbury's admission, "If there are otherways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all." [1]

Like Justice Jackson, we invoke them all, and one more: "Of course its embarrassing to confress a blunder; it may prove more embarrassing to adhere to it." [2] Though embarrassing, the blunder here is fortunately not of epic proportions—it doesn't change the result.

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[1] *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950).

[2] Justice Jackson, again, in *United States v. Bryan*, 339 U.S. 323, 346 (1950).

Though our stated basis for rejecting the state's argument opposing certification of the class seems to have been ill-founded, there is another basis that independently supports the result we reached. But before discussing the grounds that do support the result, let us first discuss the apparent error, an error that stems from our misunderstanding of the state's argument opposing class relief.

In its argument the state contended that the circuit court's certification of the class was erased by the Supreme Court's ultimate dismissal of the case in *Hogan I*.[3] We rejected this contention on the grounds that the dismissal didn't reverse the reality that taxpayers' attorney, Mr. Duffy, had been authorized by Judge Jones, the circuit court judge, to represent the class at the time the class refund claim was filed. We thus concluded that he could file the amended refund claim on behalf of the entire class and that the Supreme Court's ultimate dismissal didn't strip Mr. Duffy of his authority to file. We noted that it would work substantial mischief to "deauthorize" an attorney previously authorized to act in a case.

Our reasoning now seems flawed. It now occurs to us that the state was arguing that because the Supreme Court dismissed the case on the grounds that the taxpayers hadn't exhausted their administrative remedies before getting the class certification and the Duffy appointment from Judge Jones, the judge didn't have *subject matter jurdisdiction* to certify the class and appoint Mr. Duffy; and that his order was, therefore, null and void—leaving Mr. Duffy with no authority to have signed the class refund claim and in effect invalidating the claim.[4]

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[3] *Hogan v. Musolf*, 163 Wis. 2d 1, *cert. denied*, 112 S. Ct. 867 (1992).

[4] The state never actually came right out and said either that Judge Jones had no subject matter jurisdiction or that his order was void. But that was, we think, the thrust.

Because the argument goes to the judge's subject matter jurisdiction, we need to examine it *sua sponte* before proceeding further in the case, for a judge's lack of subject matter jurisdiction in a case renders any judgment he enters void.[5]

At the time the state's argument seemed to us a bad one, because in *Hogan I*, the Supreme Court didn't even address Judge Jones' class certification. All the Supreme Court held was that taxpayers who have § 1983 civil rights damage claims, as well as tax refund claims, must first go through the tax appeals commission with their tax refund claims before the civil rights claims ripen and may be heard.[6] The court based the decision on the exhaustion doctrine, the principle that sometimes requires civil rights plaintiffs to exhaust their administrative remedies before commencing any civil rights claims in court. Because the opinion said nothing either about "decertifying" the class or "deauthorizing" Mr. Duffy, we assumed that Judge Jones' certification and his appointment of Mr. Duffy would stand insofar as the Supreme Court was concerned.

However, it is also true, as the state pointed out, and we failed to consider, that the opinion endorsed the view that the tax appeals commission has "*exclusive* initial jurisdiction for all questions of law and fact arising under [various tax statutes]."[7] From the fact that the commission has exclusive jurisdiction, it almost seems a tautology that Judge Jones could not have had any jurisdiction to

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[5] *Kohler Co. v. DIHLR*, 259 N.W.2d 695, 81 Wis.2d 11 (1977).

[6] A sensible result, because the damage claims would seem to stand or fall on the vitality of the underlying tax claims. It would be a pointless and wasteful undertaking for the courts to deal with the damage claims without the tax claims first being resolved in accordance with the normal tax litigation process through the commission.

[7] Emphasis added.

entertain the case, and consequently had no jurisdiction or power to apoint Mr. Duffy the class attorney.

We might mention that we have considered other sources of jurisdiction that would salvage Judge Jones' order. At first we thought that he would at least have had subject matter jurisdiction over the class certification and class attorney questions, questions which are not substantive tax law questions, but are procedural questions. The action brought before him was an action for a declaratory judgment asking, among other things, for circuit court's certification of the class. The statute seems to allow declaratory actions for the sole purpose of class "formation":

> "(1) Courts of record within their respective jurisdictions . . . shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.
>
> * * *
>
> (12) This section is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." [8]

The statute does seem to give circuit courts the limited subject matter jurisdiction to declare class status even in cases where the underlying controversy involves taxes. The certification of a class is, after all, a declaration of the common legal "status" of a group. And the appointment of a class attorney is the declaration of a "legal relation" (agency or fiduciary) between the group and the attorney who seeks to represent the group.

But the problem with that approach is that it ignores the prefatory, jurisdictional enabling words, "within their

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[8] § 806.04 (1987-88).

respective jurisdictions," words of limitation we take as designed to prevent courts from certifying class actions in cases where, as here, the underlying controversy is outside the court's subject matter jurisdiction.

Evidently in the circuit courts the class action declaration procedure cannot be uncoupled from underlying cause of action. So where, as here, the substantive controversy is a tax dispute that falls within the commission's exclusive initial jurisdiction, the circuit court can't even certify the class—the substantive tax claims and procedural class claim issues must be determined together at the commission.

Here the tax relief, being as the Supreme Court said the exclusive domain of the commission in the first instance, was outside Judge Jones' jurisdiction; so it would seem that Judge Jones had no jurisdiction or authority to certify a class of aggrieved taxpayers and no jurisdiction or authority to appoint Mr. Duffy. Ergo our apparent error in using Judge Jones' order as a basis for concluding Mr. Duffy had authority to file the amended refund claim on behalf of the class.

But even though Judge Jones' certification and appointment were seemingly void, there is an independent basis on which we may now proceed to certify the class—the commission has the authority to certify class actions in its own right, and therefore we don't need to "piggyback" Mr. Duffy's authority on Judge Jones' order.

The statutes mandate that "all proceedings [before the commission] shall be conducted in accordance with rules of practice and procedure prescribed by the commission."[9] To fulfill that mandate, we have prescribed a rule that incorporates the rules of civil procedure courts follow: "the commission shall substantially follow the practice and

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[9] § 73.01(4)(b) (1989-90).

procedures before the circuit courts of this state."[10] Because the rule is a reasonable construction of our statutory powers, it has the force of law.

One of the commission-incorporated rules is a civil procedure rule that explicitly allows class actions when circumstances warrant.[11] Thus if circumstantially warranted, class actions can be maintained at the commission, those types of actions being within the ambit of the commission's authorized procedural machinery for resolving claims. Apart from the intrinsic merits of having the case move ahead in the class form, the only prerequisites to the commission hearing refund claims as a class are first that the class refund claim, like all other refund claims, be first presented to the department in the determination and redetermination process, which here it was, and second be denied, which again here it was.[12]

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[10] Rule TA § 1.39. We take "substantially" as meaning that the commission hasn't adopted those rules of civil procedure which cannot possibly apply, such as the rule that specifies the text of summonses, for example.

[11] § 803.08 (1989-90).

[12] The fact of adverse redetermination is a jurisdictional requirement, for the commission's jurisdiction extends only to review of adverse redeterminations. *See* § 71.88(2)(a) (1989-90) ("A person feeling aggrieved by the department's redetermination may appeal to the . . . commission.") Thus any class tax refund claim must be presented to the department and must be ultimately denied before the commission's jurisdiction ripens; for if the class claim is not presented to the department, there can be no department "redetermination" of the claims of the taxpayers that make up the class. Without the redetermination of those claims, the commission cannot rightly proceed.

We might also note that the class refund claim must be presented to the department even if the department has no authority to grant class refunds, about which we venture no opinion. Our jurisdiction depends upon whether there has been an adverse redetermination, not on whether the department has authority to give a favorable redetermination. (Query: Consider as a source

The remaining questions are whether a class action is an appropriate procedure in this case and whether Mr. Duffy is qualified to represent the class. But here there is not contest as to the composition of the class or Mr. Duffy's abilities.[13]

Therefore the class, as properly designated in an appropriate order to follow, will be certified, and Mr. Duffy will be appointed class attorney.

One final matter. Our order certifying the class will itself operate as Mr. Duffy's cloak of refund claim authority. We reason that our order, like all our orders, and his derivative authority thereunder to act for his clients, will relate back to the time he first professed to act for the class, thus giving him prior authority to have signed and filed the amended refund claim on behalf of the class members.[14]

We apologize for any confusion over our original ruling.

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of department authority § 73.03(1) (1989-90) which says that the department has the duty "to . . . exercise general supervision over the administration of . . . the tax laws of the state . . . to the end that . . . all assessments of income may be legally and accurately made in substantial compliance with law." Does that duty imply the duty to make reasonable efforts to seek out taxpayers whose income has been overassessed?)

[13] In the proceedings before us, the state didn't contest composition or attorney qualification, but simply asserted that the class form of action is not maintainable at all.

[14] Subject to the rights of members of the class to opt out, we in effect ratify his agency and authority as of the time the class refund claim was filed at the department of revenue. "*Omnis ratihabito retrotrahitur et mandato priori aequiparatur*: Every ratification relates back and is to be taken as the equivalent of prior authority." *Black's Law Dictionary*, 5th Ed., at 580. "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Restatement of Agency, Second* § 82.

Dated at Mequon, Wisconsin, November 6, 1992.

(not participating)
MARK E. MUSOLF
(approved)
THOMAS R. TIMKEN

/s/ Douglass H. Bartley
DOUGLASS H. BARTLEY

APPENDIX O

WISCONSIN TAX APPEALS COMMISSION

Docket No. 91-I-386

J. GERARD and DELORES M. HOGAN,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

CLARIFICATION OF REVISED RULING AND ORDER ON MOTIONS

Bartley, Commissioner, joined by Timken, Commissioner:

The second paragraph of footnote 12 on page 7 of our revised ruling and order of November 6, 1992, may be cryptic. As originally stated, it read:

> "We might also note that the class refund claim must be presented to the department even if the department has no authority to grant class refunds, about which we venture no opinion. Our jurisdiction depends upon whether there has been an adverse redetermination, not on whether the department has authority to give a favorable redetermination. (Query: Consider as a source of department authority § 73.03(1) (1989-90) which says that the department has the duty "to . . . exercise general supervision over the administration of . . . the tax laws of the state . . . to the end that . . . all assessments of income may be legally and accurately made in substantial compliance with law." Does that duty imply the duty to make reasonable efforts to seek out taxpayers whose income has been overassessed?)"

The following better states what we were getting at and we substitute it for the former:

> "We might also note that the class refund claim must be presented to the department even if the department has no established class action machinery in place, nor any express or implied power to establish the internal machinery to certify classes and designate class attorneys. (We venture no opinion on whether such a power exists). Our jurisdiction depends, among other things, upon whether there has been an adverse redetermination, a denial of the tax relief sought, not on whether the department has the procedural wherewithal to certify classes and class attorneys. The commission's jurisdiction, though derivative of the department's jurisdiction in the sense that we can only resolve tax cases that have first been presented to the department, is not derivative of what procedural mechanisms the department is authorized to invoke—in other words, we are not deprived of jurisdiction over a case that may be a candidate for the class action manner of procedure just because the department may have lacked provision for a parallel procedure. (Query: Consider, as a source of implied departmental power to certify classes and attorneys and grant class relief, § 73.03 (1) (1989-90), which says that the department has the "duty . . . power and authority [t]o exercise general supervision over the administration of . . . the tax laws of the state . . . to the end that . . . all assessments of income may be legally and accurately made in substantial compliance with law." Does that duty and power imply the duty and power to make reasonable efforts to seek out taxpayers whose incomes have been overassessed? If so, does that duty and power fairly imply an incidental power and duty to allow, where appropriate, adversarial proceedings concerning class and class attorney certification?)"

Dated at Mequon, Wisconsin, November 1, 1992.

(Approved)
THOMAS R. TIMKEN

/s/ Douglass H. Bartley
DOUGLASS H. BARTLEY

APPENDIX P

LIST OF PARTIES

Phyllis M. & Marvin G. Anderson
Eldon L. & Bessie V. Arneson
Lela G. Aubert
Neil J. & Mazie S. Baker
John J. & Florence B. Banach
William J. & Pauline A. Banta
Carl H. & Esther L. Bartel
Wayne C. & Mary M. Beard
Helen M. Bell
Walter F. Berndt
Henry A. & Gertrude M. Bernhardt
Fred C. & Kathleen E. Birkby
Kenneth H. & Crystal B. Boller
William T. & Dorothy M. Bomier
Gordon J. & Verna B. (dec'd) Brandow
Elmer E. & Frances D. Bressler
Joseph F. & Sylvia M. Brezinsky
Raymond S. & Rose Ann Byrne
Edward L. Calteaux
Norman L. & Leone Cismoski
Kenneth G. & Margaret Dane
Dorothy L. Derse
Beverly J. Dettmann
Arno E. & Shirley (dec'd) Dittbrenner
Arno E. Dittbrenner
Donald A. & Margaret M. Dod
John A. & Joan P. DuChateau
Gerhardt E. & Colleen B. Duescher
Rosemary & Raymond W. (dec'd) Duwel
William F. & Priscilla A. Dvorak
Richard L. & Dolores I. Eggener
Federick L. & Elginia J. Engstrom
Victoria B. Fisher
Charles & Ruby Freeberg
Helen A. Freeman
Helen H. & Jack D. Fulbright
Edwin S. & Lila M. Gehrke
Mark J. & Louise A. (dec'd) Gessner
Mark J. Gessner
Robert W. & Winnifred L. Geweke
Bernice M. Girouard
Beatrice M. & Samuel F. (dec'd) Gordon
Thomas J . & Jacquelyn Y. Graham
Shirley & Norbert J. Gresbach
Walter S. & Eleanor M. Grochowski
Kurt F. & Maria J. Gross
Alice I. & Carlton L. (dec'd) Hanson
Rosemarie R. & Wilfred J. (dec'd) Harvieux
Othmar J. & Rita Hasenohrl
Nels E. & Bernice E. Hedlund
Elmer E. & Mary M. Hirsch
Eugene B. & Arlene E. Hopkins
John M. & Edna C. Hovey
Martha M. Howard
Herbert E. & Helen M. Hoxie
James R. & Delores E. Huber
Dorothy K. Hull
Herbert B. Jeske
Elizabeth M. Jessop
Donald H. & Darleen F. Johnson
Herman H. & Mary E. Kaiser
Floyd E. & Elizabeth J. Kolander
Russell P. & Vivian L. Kolb
Roland G. & Velma Jean Kolwitz
Paul F. & Ruth C. Korsi
Conrad E. & Roberta M. Krantz

Joseph C. & Minnie B. Kress
William H. Kuehl
Roger W. & Nancy A. Kurth
Stanley A. & Genevieve Kuzia
Eugene R. & Patricia R. (dec'd) LaCroix
Cletus A. & Betty M. LaMarre
Walden G. & Rose Lankey
Harry J. & Myrtle A. Lanoue
Roland E. & Hilda A. Larson
Robert E. & Edna O. Lee
Eunice J. & Roland E. (dec'd) Lindeman
Francis E. & Leola C. (dec'd) Mannenbach
Edmund & Jennie S. Manydeeds
Dagmar E. Martin
Julia A. Matson
Galen A. & Dorothy E. Maurer
Charles F. & James E. (dec'd) McArdle
Howard R. & Betty S. McClanahan
Arthur H. & Jeanette G. (dec'd) Meissner
Donald F. Meyers
Rose Miller
Patrick J. & June A. Mooney
Walter H. & Shirley A. Mundstock
Theo. A. & Grace E. Ohm
Edward C. & Elizabeth L. Olson
Elmer B. & Edna B. Olson
Orville E. & Arlene R. Onstine
Harry A. & Hazel E. Otto
William & Gladys Pawelko
Ross R. & Irene E. Plainse
Raymond E. & Catharine C. Polzin
William H. & Dolores M. Polzin
Donald E. & Dorothy M. Pommerening
Alex M. & Helen E. Rakocy
Delores A. & Edward C. Redmond
Leo & Mary E. Richey
Vincent J. & Betterae Roberts
Howard P. Roepke
James P. & Florence A. Rooney
Gertrude & Harry R. (dec'd) Rozek
Mary D. Sather
Joseph W. & Myrna J. Schaefer
Robert J. & Carol J. Schaefer
Agnes M. & Lawrence P. Schanen
Myron F. & Ruth Scheid
John J. & Dorothy J. Scheuer
Walter F. & Maryjane Schoblaske
Robert E. & Caroline M. Schoenecker
Sophia E. & Thomas Schramski
Barbara V. & George A. (dec'd) Schweitzer
Henry M. Sery
Allen E. & Carol A. Shavlik
William J. & Betty Ann Sheahan
Frances M. Slawinski
Elaine & Harold F. Smith
Wendell A. Smith
Keith & Carol A. Sommerfeld
George C. & Joan Sorensen
Clarence W. & Amber M. Spalding
Elsie & John H. Stinson
Ardis L. & Lloyd G. Swanberg
Duane B. & Marian E. Taff
Thomas A. & Irene Talajkowski
Vernon H. & Esther M. Tank
Delbert D. & Evelyn C. Thomas
Quintin L. & Mae L. Thompson
Richard C. & June H. Thompson
Wilbur A. & Elizabeth C. Thoreson
Edgar A. & Hildegarde A. Traeger
Bert & Flora Viviano
George J. & Ruth C. Vopal

Frank J. & Vivian H. (dec'd) Werner
Frank J. Werner
Christy W. & Mary J. Wilson
Robert W. & June M. Wold
John & Bonnie C. Wolf
Ingeborg K. Wolff
Eleanore L. & John L. (dec'd) Young
Fred P. & Virginia L. Youngman
Thomas F. & Kathryn M. Zinke
George W. & Juanita Alley
Eldon L. & Bessie V. Arneson
Arthur T. & Ruth L. Beiderwieden
William T. & Dorothy M. Bomier
Kermit W. & Yuriko Brey
Robert & Bernyce A. Brunn
Raymond S. & Rose Ann Byrne
Mrs. Laurel G. Caruthers
Martin L. & Catherine (dec'd) Croak
(Martin L. Croak, Successor in Interest and/or Personal Representative)
Arno E. & Shirley (dec'd) Dittbrenner
(Arno E. Dittbrenner, Successor in Interest and/or personal representative)
Helen T. Donalds
Richard L. & Doris I. Eggener
Willis D. and Elaine L. Erickson
Helen A. Freeman
Robert W. & Winnifred L. Geweke
Nicholas J. & Sophia N. Gonis
Beatrice M. & Samuel (dec'd) Gordon
(Beatrice J. Gordon, Successor in Interest and/or Personal Representative)
Rosemarie R. & Wilfred J. (dec'd) Harvieux
(Rosemarie R. Harvieux, Successor in Interest and/or Personal Representative)
Stephen B. & Gloria I. Hodges
Harry L. & Evelyn M. Kelley
Russell P. & Vivian L. Kolb
Orville E. & Angela B. Krause
Joseph C. & Minnie B. Kress
Cletus A. & Betty M. LaMarre
Rita M. McHugh (Dec'd)
(James McHugh, Successor in Interest and/or Personal Representative)
Harold A. Mueller
Edward & Kathleen L. Procek
Alex M. & Helen E. Rakocy
Merlyn H. & Florence C. Reimer
Paul & Elena Renzoni
Eugene I. & Jeannette E. Sather
Lenhart E. & Joyce S. Schaefer
Thomas & Sophai E. Schramski
William J. & Betty Ann Sheahan
Frederick J. & Aileen B. Sherman
Dean R. and Bernice A. Shumway
Wilbur A. & Elizabeth C. Thoreson
Sherman (dec'd) and Ruth Weiss
(Larry K. Weiss, Successor in Interest and/or Personal Representaitve, 1805 Kensington Drive, Waukesha, Wisconsin 53188)
Frank J. & Vivian H. (dec'd) Werner
(Frank J. Werner, Successor in Interest and/or Personal Representative)
John & Bonnie C. Wolf

Ronald H. & Arline J. Wolfgram
Fred P. & Virginia L. Youngman
Thomas F. & Kathryn M. Zinke
Eugene A. and Lorraine O. Hafner
Henry G. (Dec'd) and Evelyn Thoreson
Tony M. Perushek (Dec'd)
Michael A. Frederick
Roberta R. Baity
Christopher and June M. Sheridan
Katherine Pirner

APPENDIX Q

EXCERPTS OF WISCONSIN ADMINISTRATIVE CODE

TA 1.39 Practice and procedures. (s. 73.01(4)(d), Stats.) Except as provided in s. TA 1.53, the practice and procedures before the commission shall substantially follow the practice and procedures before the circuit courts of this state.

TA 1.53 Evidence. (s. 227.08(1), Stats.) The commission is not bound by common law or statutory rules of evidence. Irrelevant, immaterial or unduly repetitious testimony shall be excluded.

APPENDIX R

EXCERPTS OF RELEVANT WISCONSIN STATUTES

Excerpt of 1995 Assembly Bill 150:

(6f) EVALUATION OF CERTAIN STATE BODIES FOR TERMINATION, TRANSFER OF FUNCTIONS OR CONTINUATION.

(a) *Legislative findings.* The legislature finds that many councils, offices, commissions and boards are not necessary to the functions of state government and should be eliminated unless they can justify their continued existence.

(b) *Definition.* In this subsection, "specified state body" means:

* * *

132. The tax appeals commission.

* * *

(c) *Reporting requirements; evaluation; recommendations.* No later than October 1, 1995, each specified state body shall submit to the lieutenant governor a report on a form prescribed by the lieutenant governor describing its functions and the justification, if any, for continuation of those functions. The Lieutenant governor shall evaluate the information contained in the reports and shall consider whether to recommend continuation of each specified state body that is required to submit a report under this subsection or transfer of the functions of that body to another state body. The department of administration shall assist the lieutenant governor in performing this evaluation upon request of the lieutenant governor. The lieutenant governor shall, no later than January 1, 1996, submit a report to the cochairpersons of the joint committee on finance containing a single piece of proposed legislation providing for termination of all specified state bodies and their functions, effective on April 1, 1996, except that if

a specified state body demonstrates to the satisfaction of the lieutenant governor that the functions of the body should be continued after March 31, 1996, the lieutenant governor may include in the proposed legislation provision for transfer of the functions of the body to another state body. In the report, the lieutenant governor shall also include any findings, recommendations or conclusions that he reaches as a result of his evaluation. If the lieutenant governor recommends continuation of any specified state body after March 31, 1996, the lieutenant governor shall also submit with the report a single piece of proposed legislation providing for termination or transfer of the functions of all specified state bodies except those bodies which the lieutenant governor recommends to be continued.

71.73 General provisions. (1) PENALTIES. Unless specifically provided in this subchapter, the penalties under subch. XIII apply for failure to comply with this subchapter, unless the context requires otherwise.

* * *

71.74 Department audits, additional assessments and refunds.

* * *

(10) NOTICE TO TAXPAYER OF ADJUSTMENT. The department shall notify the taxpayer, as provided in sub. (11), of any adjustment, correction and assessment made under sub. (1).

(11) NOTICE OF ADDITIONAL ASSESSMENT. The department shall notify the taxpayer in writing of any additional assessment by office audit or field investigation. That notice shall be served as are circuit court summonses, or by registered mail, or by regular mail if the person assessed admits receipt or there is satisfactory evidence of receipt.

* * *

(12) TAXES DELINQUENT AFTER DUE DATE. Additional income taxes assessed under subs. (1) to (5), (7) and

(8) shall become delinquent if not paid on or before the due date stated in the notice to the taxpayer.

(13) COLLECTION OF ADDITIONAL TAX AND ISSUANCE OF REFUNDS. (a) If the tax is increased the department shall proceed to collect the additional tax in the same manner as other income taxes are collected. If the income taxes are decreased upon direction of the department the state treasurer shall refund to the taxpayer such part of the overpayment as was actually paid in cash, and the certification of the overpayment by the department shall be sufficient authorization to the treasurer for the refunding of the overpayment. No refund of income tax shall be made by the treasurer unless the refund is so certified. The part of the overpayment paid to the county and the local taxation district shall be deducted by the state treasurer in the treasurer's next settlement with the county and local treasurer.

* * *

(14) ADDITIONAL REMEDY TO COLLECT TAX. The department of revenue may also proceed under s. 71.91(5) for the collection of any additional assessment of income or franchise taxes or surtaxes, after notice thereof has been given under sub. (11) and before the same shall have become delinquent, when it has reasonable grounds to believe that the collection of such additional assessment will be jeopardized by delay. In such cases notice of the intention to so proceed shall be given by registered mail to the taxpayer, and the warrant of the department of revenue shall not issue if the taxpayer within 10 days after such notice furnishes a bond in such amount, not exceeding double the amount of the tax, and with such sureties as the department of revenue shall approve, conditioned upon the payment of so much of the additional taxes as shall finally be determined to be due, together with interest thereon as provided by s. 71.82(1)(a). Nothing in this subsection shall affect the review of additional assessments provided by ss. 71.88(1)(a) and (2)(a), 71.89(2), 73.01 and 73.015, and any amounts

collected under this subsection shall be deposited with the state treasurer and disbursed after final determination of the taxes as are amounts deposited under s. 71.90(2).

(15) PAYMENTS. All nondelinquent payments of additional amounts owed shall be applied in the following order: penalties, interest, tax principal.

* * *

71.75 Claims for refunds. (1) Except as provided in ss. 46.255, 71.77(5) and (7)(b) and 71.93, the provisions for refunds and credits provided in this section shall be the only method for the filing and review of claims for refund of income and surtaxes, and no person may bring any action or proceeding for the recovery of such taxes other than as provided in this section.

* * *

(6) Every claim for refund or credit of income or surtaxes shall be filed with the department of revenue and signed by the person or, in the case of joint returns, by both persons who filed the return on which the claim is based and shall set forth specifically and explain in detail the reasons for and the basis of the claim. After the claim has been filed it shall be considered and acted upon in the same manner as are additional assessments made under s. 71.74(1) and (2). No marital property agreement or unilateral statement under ch. 766 affects claims for refund or credit under this section.

* * *

71.78 Confidentiality provisions.

* * *

(2) DISCLOSURE OF NET TAX. The department shall make available upon suitable forms prepared by the department information setting forth the net Wisconsin income tax, Wisconsin franchise tax or Wisconsin gift tax reported as paid or payable in the returns filed by any individual or corporation for any individual year

upon request. Before the request is granted, the person desiring to obtain the information shall prove his or her identity and shall be required to sign a statement setting forth the person's address and reason for making the request and indicating that the person understands the provisions of this section with respect to the divulgement, publication or dissemination of information obtained from returns as provided in sub. (1). The use of a fictitious name is a violation of this section. Within 24 hours after any information from any such tax return has been so obtained, the department shall mail to the person from whose return the information has been obtained a notification which shall give the name and address of the person obtaining the information and the reason assigned for requesting the information. The department shall collect from the person requesting the information a fee of $4 for each return.

* * *

71.80 General administrative provisions. (1) DEPARTMENT DUTIES AND POWERS. (a) The department of revenue shall assess incomes as provided in this chapter and in performance of such duty the department shall possess all powers now or hereafter granted by law to the department in the assessment of personal property and also the power to estimate incomes.

* * *

(3) CREDITING OF OVERPAYMENTS ON INDIVIDUAL OR SEPARATE RETURNS. In the case of any overpayment, refundable credit or refund on an individual or separate return, the department of revenue, within the applicable period of limitations, may credit the amount of overpayment, refundable credit or refund including any interest allowed, against any liability in respect to any tax collected by the department, a debt under s. 71.93 or a certification under s. 46.255 on the part of the person who made the overpayment or received the refundable credit or the refund and shall refund any balance to the

person. The department shall presume that the overpayment, refundable credit or refund is nonmarital property of the filer. Within 2 years after the crediting, the spouse or former spouse of the person filing the return may file a claim for a refund of amounts credited by the department if the spouse or former spouse shows by clear and convincing evidence that all or part of the state tax overpayment, refundable credit or refund was nonmarital property of the nonobligated spouse.

* * *

INTEREST AND PENALTIES

71.82 Interest. (1) NORMAL. (a) In assessing taxes interest shall be added to such taxes at 12% per year from the date on which such taxes if originally assessed would have become delinquent if unpaid, to the date on which such taxes when subsequently assessed will become delinquent if unpaid.

(b) Except as otherwise specifically provided, in crediting overpayments of income and surtaxes against underpayments or against taxes to be subsequently collected and in certifying refunds of such taxes interest shall be added at the rate of 9% per year from the date on which such taxes when assessed would have become delinquent if unpaid to the date on which such overpayment was certified for refund except that if any overpayment of tax is certified for refund within 90 days after the last date prescribed for filing the return of such tax or 90 days after the date of actual filing of the return of such tax, whichever occurs later, no interest shall be allowed on such overpayment. For purposes of this section the return of such tax shall not be deemed actually filed by an employe unless and until the employe has included the written statement required to be filed under s. 71.65(1). However when any part of a tax paid on an estimate of income, whether paid in connection with a tentative return or not, is refunded or credited to a taxpayer, such refund or credit shall not draw interest.

(c) Any assessment made as a result of the adjustment or disallowance of a claim for credit under s. 71.07(3m) or (6), 71.28(1) or (2m) or 71.47(1) or 2(m) or subch. VIII or IX, except as provided in sub. (2)(c), shall bear interest at 12% per year from the due date of the claim.

(2) DELINQUENT. (a) *Income and franchise taxes.* Income and franchise taxes shall become delinquent if not paid when due under ss. 71.03(8), 71.24(9) and 71.44(4), and when delinquent shall be subject to interest at the rate of 1.5% per month until paid.

(b) *Department may reduce delinquent interest.* The department shall provide by rule for reduction of interest under par. (a) to 12% per year in stated instances wherein the secretary of revenue determines that reduction is fair and equitable.

(c) *Adjustment to credits.* Any assessment made as a result of the disallowance of a claim for credit made under s. 71.07 (3m) or (6), 71.28(1) or (2m) or 71.47(1) or (2m) or subch. VIII or IX with fraudulent intent, or of a portion of a claim made under said subchapters or sections that was excessive and was negligently prepared, shall bear interest from the due date of the claim, until refunded or paid, at the rate of 1.5% per month.

* * *

71.83 Penalties. (1) CIVIL (a) *Negligence.* 1. 'Failure to file.' In case of failure to file any return required under s. 71.03, 71.24 or 71.44 on the due date prescribed therefor, including any extension of time for filing, unless it is shown that the failure is due to reasonable cause and not due to wilful neglect, there shall be added to the amount required to be shown as tax on the return 5% of the amount of the tax if the failure is for not more than one month, with an additional 5% for each additional month or fraction thereof during which the failure continues, not exceeding 25% in the aggregate.

For purposes of this subdivision, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the due date prescribed for payment and by the amount of any credit against the tax which may be claimed upon the return.

2. 'Incomplete or incorrect return.' If any person required under this chapter to file an income or franchise tax return files an incomplete or incorrect return, unless it is shown that such filing was due to good cause and not due to neglect, there shall be added to such person's tax for the taxable year 25% of the amount otherwise payable on any income subsequently discovered or reported. The amount so added shall be assessed, levied and collected in the same manner as additional normal income or franchise taxes, and shall be in addition to any other penalties imposed by this chapter. In this subdivision, "return" includes a separate return filed by a spouse with respect to a taxable year for which a joint return is filed under s. 71.03(2)(g) to (L) after the filing of that separate return, and a joint return filed by the spouses with respect to a taxable year for which a separate return is filed under s. 71.03(2)(m) after the filing of that joint return.

* * *

(b) *Intent to defeat or evade.* 1. Income and franchise; all persons. With respect to calendar year 1985 or corresponding fiscal year and subsequent calendar or fiscal years, any person making an incorrect, or failing to make a, report, including a separate return filed by a spouse with respect to a taxable year for which a joint return is filed under s. 71.03(2)(g) to (L) after the filing of that separate return, and including a joint return filed by the spouses with respect to a taxable year for which a separate return is filed under s. 71.03(2)(m) after the filing of that joint return, with intent, in either case, to defeat or evade the income or franchise tax assessment required by law, shall have added to the tax

an amount equal to 100% of the tax on the entire underpayment. No amount paid under this subdivision may be deducted from gross income and assessments hereunder may be made with respect to decedents. Amounts added to the tax under this subdivision shall be treated as additional taxes for all purposes of assessment and collection.

* * *

(2) CRIMINAL. (a) *Misdemeanor.* 1. All persons. If any person, including an officer of a corporation required by law to make, render, sign or vertify any return, wilfully fails or refuses to make a return at the time required in s. 71.03, 71.24 or 71.44 or wilfully fails or refuses to make deposits or payments as required by s. 71.65(3) or wilfully renders a false or fraudulent statement required by s. 71.65(1) and (2) or deposit report or withholding report required by s. 71.65(3), such person shall be guilty of a misdemeanor and may be fined not more than $10,000 or imprisoned for not to exceed 9 months or both, together with the cost of prosecution.

2. Penalties for certain false documents. Any person who wilfully makes and subscribes any return, claim, statement or other document required by this chapter that that person does not believe to be true and correct as to every material matter or who wilfully aids in, procures, counsels or advises the preparation of any return, claim, statement or other document that is false or fraudulent as to any material matter related to, or required by, this chapter may be fined not more than $10,000 or imprisoned for not more than 9 months or both, together with the cost of prosecution.

* * *

(3) LATE FILING FEES. If any person required under this chapter to file an income or franchise tax return fails to file a return within the time prescribed by law, or as extended under s. 71.03(7), 71.24(7) or 71.44(3), the department shall add to the tax of the person $10 in the case of corporations and in the case of persons other than corporations $2 when the total normal income tax of

the person is less than $10, $3 when the tax is $10 or more but less than $20, $5 when the tax is $20 or more, except that $20 shall be added to the tax if the return is 60 or more days late. If no tax is assessed against any such person the amount of this fee shall be collected as income taxes are collected, and no person shall be allowed in any action or proceeding to contest the imposition of such fee.

* * *

71.88 Time for filing an appeal. (1) APPEAL TO THE DEPARTMENT OF REVENUE. (a) *Contested assessments and claims for refund.* Except for refunds set off under s. 71.93 in respect to which appeal is to the agency to which the debt is owed and except for refunds set off under s. 46.255 in respect to which a hearing is held before the circuit court, any person feeling aggrieved by a notice of additional assessment, refund, or notice of denial of refund may, within 60 days after receipt of the notice, petition the department of revenue for redetermination. A petition or an appeal by one spouse is a petition or an appeal by both spouses. The department shall make a redetermination on the petition within 6 months after it is filed.

* * *

(2) APPEAL TO THE WISCONSIN TAX APPEALS COMMISSION. (a) *Appeal of the department's redetermination of assessments and claims for refund.* A person feeling aggrieved by the department's redetermination may appeal to the tax appeals commission by filing a petition with the clerk of the commission as provided by law and the rules of practice promulgated by the commission. If a petition is not filed with the commission within the time provided in s. 73.01 or, except as provided in s. 71.75(5), if no petition for redetermination is made within the time provided the assessment, refund, or denial of refund shall be final and conclusive.

* * *

73.01 Tax appeals commission. (1) DEFINITIONS. In this section:

* * *

(b) Any matter required to be heard by the commission may be heard by any member of the commission or its hearing examiner and reported to the commission, and hearings of matters pending before it shall be assigned to members of the commission or its hearing examiner by the chairperson. Unless a majority of the commission decides that the full commission should decide a case, cases other than small claims cases shall be decided by a panel of 3 members assigned by the chairperson prior to the hearing. If the parties have agreed to an oral decision, the member or members conducting the hearing may render an oral decision. Hearings shall be open to the public and all proceedings shall be conducted in accordance with rules of practice and procedure prescribed by the commission. Small claims cases shall be decided by one commissioner assigned by the chairperson prior to the hearing.

(bn) The parties to any matter required to be heard and decided by the commission, except appeals arising under s. 70.64 or ch. 76, may consent in writing that the chairman or any member of the commission assigned to hear the matter may render an oral decision, and that the parties waive the right to appeal such decision. Such oral decision shall not be binding upon the department, as to statutory construction, in a subsequent matter. Provisions of this section, s. 73.015 or ch. 227 in conflict herewith shall not apply to decisions rendered under this paragraph.

* * *

(d) Any member of the commission or any employe of the commission, designated in writing for the purpose by the chairman, may administer oaths, and any member of the commission may summon and examine witnesses and require by subpoena the production of all returns, books, papers, documents, correspondence and other evi-

dence pertaining to the matter under inquiry, at any designated place of hearing and may require the taking of a deposition before any person competent to administer oaths, either within or without the state, upon notice to the interested party in like manner that depositions of witnesses are taken in civil actions pending in the circuit court. Any party to a matter pending before the commission may summon witnesses or require the production of papers in the same manner as witnesses are summoned or papers required to be produced in civil actions in the circuit court. Any person summoned or whose deposition is taken shall receive the same fees and mileage as would be allowed in a civil action pending in the circuit court, and the expense thereof shall be paid by the person summoning such witness or causing the deposition to be taken.

* * *

(dn) In connection with the hearing of any matter required to be heard and decided by the commission, except appeals arising under s. 70.64 or ch. 76, the chairperson or any member of the commission assigned to hear the matter may, with the consent of the parties, render an oral decision. In small claims cases, the presiding commissioner may, without consent of the parties, either render an oral decision at the close of the hearing or provide a written decision to all parties within 2 weeks after the hearing. Decisions in small claims cases are not precedents. Any party may appeal such oral decision as provided in s. 73.015. Oral decisions constitute notice for purposes of determining the time in which appeals may be taken. Provisions of this section or ch. 227 in conflict with this paragraph do not apply to decisions rendered under this paragraph.

(e) Except as provided in par. (dn), the commission in each case heard by it shall, irrespective of ch. 227, make a decision in writing accompanied by findings of fact and conclusions of law. The commission may issue an opinion in writing in addition to its findings of fact and

decision. The decision or order of the commission shall become final and shall be binding upon the petitioner and upon the department of revenue for that case unless an appeal is taken from the decision or order of the commission under s. 73.015. Except in respect to small claims decisions, if the commission construes a statute adversely to the contention of the department of revenue:

1. Except as provided in subd. 2, the department shall be deemed to acquiesce in the construction so adopted unless the department seeks review of the order or decision of the commission so construing the statute. For purposes of this subdivision, the department has sought review of the order or decision if it seeks review and later settles the case or withdraws its petition for review or if the merits of the case are for other reasons not determined by judicial review. The construction so acquiesced in shall thereafter be followed by the department.

2. The department may choose not to appeal and to nonacquiesce in the decision or order by sending a notice of nonacquiescence to the clerk of the commission, to the revisor of statutes for publication in the Wisconsin administrative register and to the taxpayer or the taxpayer's representative before the time expires for seeking a review of the decision or order under s. 73.015. The effect of this action is that, although the decision or order is binding on the parties for the instant case, the commission's conclusions of law, the rationale and construction of statutes in the instant case are not binding upon or required to be followed by the department in other cases.

* * *

(4m) DEADLINE FOR DECISIONS. (a) The final decision or order of the commission shall be issued within 90 days after the date on which the last document necessary to the decision of the matter is received or the date on which a hearing is closed, whichever is later, unless good cause is shown or unless the parties and the commission agree to an extension.

(5) APPEALS TO COMMISSION. (a) Any person . . . who has filed a petition for redetermination with the department of revenue and who is aggrieved by the redetermination of the department may, within 60 days of the determination . . . of the department or, in all other cases, within 60 days after the redetermination but not thereafter, file with the clerk of the commission a petition for review of the action of the department and the number of copies of the petition required by rule adopted by the commission.

* * *

73.015 Review of determination of tax appeals commission. (1) This section shall provide the sole and exclusive remedy for review of any decision or order of the tax appeals commission and no person may contest, in any action or proceeding, any matter reviewable by the commission unless such person has first availed himself or herself of a hearing before the commission under s. 73.01 or has cross-appealed under s. 70.995(8)(a).

* * *

73.03 Powers and duties defined. It shall be the duty of the department of revenue, and it shall have power and authority:

(1) To have and exercise general supervision over the administration of the assessment and tax laws of the state, over assessors, boards of review, supervisors of equalization, and assessors of incomes, and over the county boards in the performance of their duties in making the taxation district assessment, to the end that all assessments of property be made relatively just and equal at full value and that all assessments of income may be legally and accurately made in substantial compliance with law.

* * *

(13) To investigate the tax systems of other states and countries and to formulate and recommend such legisla-

tion as may be deemed expedient to prevent evasion of assessment and tax laws and to secure just and equal taxation and improvement in the system of taxation in the state.

(15) To consult and confer with the governor of the state upon the subject of taxation, the administration of the laws in relation thereto and the progress of the work of the department, and to furnish the governor from time to time such assistance and information as he may require.

(17) To disseminate from time to time, in such manner as shall best be calculated to attract general public attention, facts and data concerning public expenditures, sources of revenue, responsibility for levies, the value and relative tax burdens borne by different classes of property, and other useful and valuable information concerning the subject of taxation and public finance.

(18) To exercise and perform such further powers and duties as may be granted to or imposed upon the department by law.

(22) To appear by its counsel and represent the state in all matters before the tax appeals commission. Except as provided in ch. 72 and in s.76.08(1), the department of justice shall provide legal counsel to appear for the department in all courts, but with the consent of the attorney general a member of the staff of the department may appear for the department.

* * *

(25) To settle and dispose of tax cases or issues pending before the tax appeals commission when, in the judgment of the department of revenue, such action is warranted in the best interests of the state; and, with the approval of the attorney general, to settle and dispose of tax cases or issues pending in the courts.

* * *

227.48 Service of decision. (1) Every decision when made, signed and filed, shall be served forthwith by personal delivery or mailing of a copy to each party to the proceedings or to the party's attorney of record.

(2) Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, the time allowed for filing each petition and identification of the party to be named as respondent. No time period specified under s. 227.49(1) for filing a petition for rehearing, under s. 227.53(1)(a) for filing a petition for judicial review or under any other section permitting administrative review of an agency decision begins to run until the agency has complied with this subsection.

* * *

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted onl yon the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

* * *

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the com-

missioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) 1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board or the consumer credit review board, the credit union review board or the savings and loan review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1 to 4.

2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 277.48. If a rehearing is requested under s. 277.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

* * *

227.54 Stay of proceedings. The institution of the proceeding for review shall not stay enforcement of the agency decision. The reviewing court may order a stay upon such terms as it deems proper, except as otherwise provided in ss. 196.43 and 551.62.

* * *

803.08 Class actions. When the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

* * *

990.001 Construction of laws; rules for. In construing Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature:

(1) SINGULAR AND PLURAL. The singular includes the plural, and the plural includes the singular.

(2) GENDER. Words importing one gender extend and may be applied to any gender. Any person who by statute, rule or ordinance is designated a chairman, alderman or other similar title may use another equivalent title such as, in the case of a chairman, "chair", "chairperson", "chairwoman" or other such appropriate title.

(3) TENSES. The present tense of a verb includes the future when applicable. The future perfect tense includes past and future tenses.

* * *

(9) ACTS BY AGENTS. If a statute requires an act to be done which may legally be done by an agent, such requirement includes all such acts when done by an authorized agent.

* * *

(2)

Supreme Court, U.S.
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No. 95-1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

J. GERARD HOGAN, *et al.*,
Petitioners,

v.

WISCONSIN DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Wisconsin Court of Appeals, District IV

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners respectfully invite the Court's attention to another petition now pending before it, which presents an issue closely related to the one presented here. *General Motors Corp. v. City of Linden*, No. 95-1930. The *General Motors*' petition and reply brief in support thereof underscore that the issues presented herein and therein are important and recurring ones which warrant this Court's review.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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